UNITED STATES REPORTS

VOLUME 346

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1952
JUNE SPECIAL TERMS, 1953

AND

OCTOBER TERM, 1953

OPINIONS FROM JUNE 8, 1953, THROUGH JANUARY 18, 1954
DECISIONS PER CURIAM AND ORDERS FROM
OCTOBER 5, 1953, THROUGH JANUARY 18, 1954

WALTER WYATT
REPORTER OF DECISIONS

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ERRATA.

344 U. S. 837, No. 282: "126 N. E. 2d 124" should read "106 N. E. 2d 124."

344 U. S. 897, No. 418: "234 P. 2d 279" should read "246 P. 2d 642."

344 U. S. 916, No. 475, Misc.: "343 U. S. 890" should read "343 U. S. 980."

345 U. S. 495, lines 27 and 32; and 498, line 29: "250 S. W. 2d 659" should read "250 S. W. 2d 569."

JUSTICES
OF THE
SUPREME COURT
DURING THE TIME OF THESE REPORTS.*

FRED M. VINSON, CHIEF JUSTICE.[1]
EARL WARREN, CHIEF JUSTICE.[2]
HUGO L. BLACK, ASSOCIATE JUSTICE.
STANLEY REED, ASSOCIATE JUSTICE.
FELIX FRANKFURTER, ASSOCIATE JUSTICE.
WILLIAM O. DOUGLAS, ASSOCIATE JUSTICE.
ROBERT H. JACKSON, ASSOCIATE JUSTICE.
HAROLD H. BURTON, ASSOCIATE JUSTICE.
TOM C. CLARK, ASSOCIATE JUSTICE.
SHERMAN MINTON, ASSOCIATE JUSTICE.

HERBERT BROWNELL, JR., ATTORNEY GENERAL.
ROBERT L. STERN, ACTING SOLICITOR GENERAL.[3]
HAROLD B. WILLEY, CLERK.
WALTER WYATT, REPORTER OF DECISIONS.
T. PERRY LIPPITT, MARSHAL.
HELEN NEWMAN, LIBRARIAN.

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*Notes on p. IV.

NOTES.

[1] Mr. Chief Justice Vinson died in Washington, D. C., on September 8, 1953. See *post*, p. VII. Services were held at the Cathedral Church of Saint Peter and Saint Paul, in Washington, D. C., on September 10, 1953, and at the Louisa Methodist Church, in Louisa, Ky., on September 11, 1953. Interment was in Pine Hill Cemetery, at Louisa, Ky., on September 11, 1953.

[2] Earl Warren, of California, was appointed by President Eisenhower on October 2, 1953 (a recess appointment), to be Chief Justice of the United States, and he took the oaths and his seat on October 5, 1953. (See *post*, p. VII.)

[3] During the period covered by this volume, the duties of the office of Solicitor General were performed by Mr. Robert L. Stern, First Assistant to the Solicitor General, who signed government briefs and appeared as "Acting Solicitor General."

SUPREME COURT OF THE UNITED STATES.

ALLOTMENT OF JUSTICES.

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, section 42, and that such allotment be entered of record, viz:

For the District of Columbia Circuit, EARL WARREN, Chief Justice.

For the First Circuit, FELIX FRANKFURTER, Associate Justice.

For the Second Circuit, ROBERT H. JACKSON, Associate Justice.

For the Third Circuit, HAROLD H. BURTON, Associate Justice.

For the Fourth Circuit, EARL WARREN, Chief Justice.

For the Fifth Circuit, HUGO L. BLACK, Associate Justice.

For the Sixth Circuit, STANLEY REED, Associate Justice.

For the Seventh Circuit, SHERMAN MINTON, Associate Justice.

For the Eighth Circuit, TOM C. CLARK, Associate Justice.

For the Ninth Circuit, WILLIAM O. DOUGLAS, Associate Justice.

For the Tenth Circuit, TOM C. CLARK, Associate Justice.

October 12, 1953.

(For next previous allotment, see 345 U. S. p. IV.)

DEATH OF MR. CHIEF JUSTICE VINSON AND APPOINTMENT OF MR. CHIEF JUSTICE WARREN.

SUPREME COURT OF THE UNITED STATES.

MONDAY, OCTOBER 5, 1953.

Present: MR. JUSTICE BLACK, MR. JUSTICE REED, MR. JUSTICE FRANKFURTER, MR. JUSTICE DOUGLAS, MR. JUSTICE JACKSON, MR. JUSTICE BURTON, MR. JUSTICE CLARK, and MR. JUSTICE MINTON.

MR. JUSTICE BLACK said:

With deep sorrow the Court records at this time the sudden and unexpected death on September 8, 1953, of our Chief Justice, Fred M. Vinson. Death came in his 63rd year. Most of his life was spent in fine public service for his State and his Nation, both of which he loved and served with passionate devotion. Since 1946—seven years—he worked with us as Chief Justice. His services here, as in the many other public jobs he held, were able and unselfish. His colleagues of this Court respected him for his integrity and ability. They loved him for his kindness, sympathy, understanding and fairness. We join the Nation in lamenting the death of this capable and loyal public servant. We, his brethren of the Court, also mourn the loss of a congenial and treasured friend. At an appropriate time the Court will receive resolutions in tribute to his memory. Now the business of the Court goes on.

The President has appointed Earl Warren of California to be Chief Justice. His credentials have been presented and he has taken his constitutional oath.

His commission will now be read, the judicial oath administered by the Clerk, and Mr. Warren will then take his place as The Chief Justice of the United States.

The Clerk then read the commission as follows:

DWIGHT D. EISENHOWER,

PRESIDENT OF THE UNITED STATES OF AMERICA,

To all who shall see these Presents, Greeting:

KNOW YE; That reposing special trust and confidence in the Wisdom, Uprightness and Learning of Earl Warren of California I do appoint him Chief Justice of the United States and do authorize and empower him to execute and fulfil the duties of that Office according to the Constitution and Laws of the said United States, and to Have and to Hold the said Office, with all the powers, privileges and emoluments to the same of right appertaining, unto Him, the said Earl Warren until the end of the next session of the Senate of the United States and no longer; subject to the provisions of law.

IN TESTIMONY WHEREOF, I have caused these Letters to be made patent and the seal of the Department of Justice to be hereunto affixed.

Done at the City of Washington this Second day of October, in the year of our Lord one thousand nine hundred and fifty three and of the Independence of the United States of America the one hundred and seventy eighth.

DWIGHT D. EISENHOWER

By the President:

HERBERT BROWNELL Jr.
Attorney General.

The oath of office was then administered by the Clerk, and MR. CHIEF JUSTICE WARREN was escorted by the Marshal to his seat on the bench.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1952.

UNITED STATES *v.* NUGENT.

NO. 540. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.*

Argued May 1, 4, 1953.—Decided June 8, 1953.

Under § 6 (j) of the Selective Service Act of 1948, a person whose claim for exemption as a conscientious objector has been rejected by his local draft board may appeal to an appeal board, which is required to refer the claim to the Department of Justice for a recommendation, which the appeal board is required to consider but is not bound to follow. Before making its recommendation, the Department is required to make an "appropriate inquiry" and to hold a "hearing." After investigating the appellant's background and reputation for sincerity, the Department conducts a hearing, at which the appellant is allowed to appear in person, accompanied by an advisor and witnesses to testify in his behalf. Upon request, he is entitled to be instructed "as to the general nature and character" of any "unfavorable" evidence developed by the investigation; but he is not permitted to see the investigator's report, nor is he informed of the names of persons interviewed by the investigator. *Held:*

1. This procedure satisfies the requirements of the Act. Pp. 2–9.

(a) The statutory scheme for review of exemptions claimed by conscientious objectors does not entitle them to have the investigators' reports produced for their inspection. Pp. 5–6.

(b) The Department satisfies its duties under § 6 (j) when it accords the registrant a fair opportunity to present his views

*Together with No. 573, *United States* v. *Packer*, on certiorari to the same court.

before an impartial hearing officer, permits him to produce all relevant evidence in his own behalf and supplies him with a fair résumé of any adverse evidence in the investigator's report. P. 6.

(c) The requirement of § 6 (j), that the Department afford the registrant a "hearing," does not require it to entertain an all-out collateral attack on the testimony obtained in the prehearing investigation. Pp. 6–9.

2. As thus construed and applied, the Act does not violate the Fifth Amendment. Pp. 9–10.

3. In neither of these cases can the registrant complain of any failure of the Department to supply him with a fair résumé of the investigator's report, because one of them did not request it and in neither case was the investigator's report transmitted to the appeal board or represented to it as being unfavorable. P. 6, note 10.

200 F. 2d 46 and 200 F. 2d 540, reversed.

Respondents were convicted of violating § 12 of the Selective Service Act of 1948, 50 U. S. C. App. (Supp. V) § 462, by willfully refusing to submit to induction into the armed forces of the United States. The Court of Appeals reversed. 200 F. 2d 46, 540. This Court granted certiorari. 345 U. S. 915. *Reversed*, p. 10.

Robert W. Ginnane argued the cause for the United States. With him on the brief were *Acting Solicitor General Stern* and *Beatrice Rosenberg*.

Hayden C. Covington argued the cause for respondents. With him on the brief was *Herman Adlerstein*.

MR. CHIEF JUSTICE VINSON delivered the opinion of the Court.

Section 6 (j) of the Selective Service Act[1] provides exemption from military service—partial or full, depending upon the circumstances—for any person "who, by

[1] Section 6 (j) appeared in the 1940 Selective Service Act as § 5 (g), 54 Stat. 885, 889. It was reenacted as § 6 (j) of the Selective Service Act of 1948. 62 Stat. 604, 613, 50 U. S. C. § 456 (j). The Act was

reason of religious training and belief, is conscientiously opposed to participation in war in any form." If the conscientious objector's claim for relief under this Section is denied by his local draft board, he is entitled to further review by an "appropriate appeal board." All such appeals are referred to the Department of Justice for an "appropriate inquiry" and a "hearing." The Department of Justice then makes a recommendation to the appeal board, which may or may not follow it in reviewing the local board's classification.

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amended in 1951, 65 Stat. 75, 86, 50 U. S. C. App. (Supp. V) § 456 (j), and the present language of § 6 (j) differs in immaterial respects from the language in the earlier statutes.

The full text of § 6 (j) of the Selective Service Act of 1948 reads:

"Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, be deferred. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the

These two cases are concerned with the procedure, established by regulation and practice,[2] which is followed when a conscientious objector's appeal is referred to the Department of Justice. The Department has regularly used the FBI to investigate each appealing registrant's background and reputation for sincerity. A hearing is then held before a designated "hearing officer." The registrant is allowed to appear in person, and, if he chooses, he may bring with him an advisor and witnesses to testify in his behalf.[3] Upon request, he is entitled to be instructed "as to the general nature and character" of any "unfavorable" evidence developed by the Depart-

objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall be deferred. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors."

There is a dearth of legislative history reflecting discussion in Congress about this phase of the Selective Service Act. The problem was discussed rather briefly during the Committee hearings on the 1940 Act. See Hearings Before the Committee on Military Affairs United States Senate on S. 4164, 76th Cong., 3d Sess., and Hearings Before the Committee on Military Affairs House of Representatives on H. R. 10132, 76th Cong., 3d Sess. Compare H. R. Rep. No. 2903, 76th Cong., 3d Sess., p. 5.

[2] See 32 CFR § 1626.25 (1949 ed.); see also 17 Fed. Reg. 5449, June 18, 1952.

[3] See, Instructions to Registrants Whose Claims for Exemption as Conscientious Objectors Have Been Appealed (a letter sent to the appealing registrant from the office of the Attorney General) reproduced in part in the record in the *Nugent* case, at p. 54.

ment's investigation.[4] But he is not permitted to see the FBI report, nor is he informed of the names of persons interviewed by the investigators.

It is the Department's refusal to disclose the entire FBI reports which precipitates the issues now before us. The Court of Appeals for the Second Circuit has held that this procedure violates a registrant's rights under the Selective Service Act.[5] We granted certiorari, 345 U. S. 915, because that determination seemed in conflict with the decisions of other Courts of Appeals[6] and because it dealt with an important problem in the administration of the Selective Service Act.

Each of the respondents claims to be a conscientious objector entitled to total exemption from military service. Each has been convicted of wilfully refusing to submit to induction in the armed forces of the United States.[7] At their trials, respondents challenged the validity of their selective service classifications, claiming that they were fixed without basis in fact[8] and without adherence to the procedures prescribed by § 6 (j) of the Act;[9] each claimed that the Department of Justice's failure to show him the FBI reports rendered his classification illegal. The Court of Appeals, reversing each respondent's conviction, sustained the claims.

We think that the Court of Appeals erred. We think that the statutory scheme for review, within the selective service system, of exemptions claimed by conscientious

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[4] *Ibid.*

[5] *United States* v. *Nugent*, 200 F. 2d 46, and *United States* v. *Packer*, 200 F. 2d 540.

[6] See *e. g.*, *Imboden* v. *United States*, 194 F. 2d 508 (C. A. 6th Cir. 1952); *Elder* v. *United States*, 202 F. 2d 465 (C. A. 9th Cir. 1953).

[7] 50 U. S. C. App. (Supp. V) § 462.

[8] *Cox* v. *United States*, 332 U. S. 442 (1947).

[9] *Estep* v. *United States*, 327 U. S. 114 (1946).

objectors entitles them to no guarantee that the FBI reports must be produced for their inspection. We think the Department of Justice satisfies its duties under § 6 (j) when it accords a fair opportunity to the registrant to speak his piece before an impartial hearing officer; when it permits him to produce all relevant evidence in his own behalf and at the same time supplies him with a fair résumé of any adverse evidence in the investigator's report.[10]

Respondents urge that this is not enough. The argument rides hard upon the word "hearing" in § 6 (j). It

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[10] As to what constitutes a "fair résumé" see *Imboden v. United States, supra.* Compare *United States v. Oller,* 107 F. Supp. 54 (D. Conn. 1952), and *United States v. Bouziden,* 108 F. Supp. 395 (W. D. Okla. 1952).

We need not reach that question in these cases because in our view respondents cannot complain of any failure on the part of the Department of Justice to supply them with a summary of the evidence.

Respondent Nugent first indicated to his local board that he would only serve as a noncombatant. Thereafter, when required to submit additional information, he stated that he was opposed to any military service whatsoever. The local board, after a hearing, classified him as 1–A–O which rendered him eligible only for noncombatant military service. He appealed, claiming total exemption. Pursuant to § 6 (j) his case was referred to the Department of Justice.

Instructions mailed to respondent Nugent informed him of his right to "request" the Hearing Officer to "advise" him of the "general nature and character of any evidence" which was "unfavorable" to his claim. Respondent never requested the Hearing Officer for any summary of the FBI investigation. He claims he was misled by the Hearing Officer's secretary who told him that the "files" were "favorable." But respondent made no effort to verify this statement; at no time did he say anything or make any request to the Hearing Officer concerning the FBI report.

Moreover, the Hearing Officer, in his own report on the case, said nothing which would indicate that the secretary's comment was erroneous. He did not purport to base his recommendation on material submitted by the FBI; rather his recommendation seems based upon Nugent's own conduct and testimony at the hearing coupled

is suggested that the "hearing" prescribed by Congress was purposely designed to allow the registrant to refute—item by item, if necessary—the matters discussed in the investigator's report.[11] In sum, respondents assimilate the "hearing" in § 6 (j) to a trial and insist that it imports a right to confront every informant who may have rendered adverse comment to the FBI.

The statute does entitle the registrant to a "hearing," and of course no sham substitute will meet this requirement; but we do not think that the word "hearing"—when put in the context of the whole scheme for review set forth in § 6 (j)—comprehends the formal and litigious procedures which respondents' interpretation would attribute to it. Instead, the word takes its meaning in this instance from an analysis of the precise function

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with the fact that respondent, in his original classification questionnaire, had indicated a willingness to serve as a noncombatant—the classification to which he had been assigned.

An additional statement by a Special Assistant to the Attorney General, forwarding the Hearing Officer's report to the appeal board, also made no mention that there was adverse matter in the FBI report.

No part of the FBI report was transmitted to the appeal board. Thus the record before the appeal board contained no evidence secured by the FBI. In view of this, and in view of his failure to make any request to the Hearing Officer, we think that Nugent was not denied any right.

Nor was respondent Packer denied his right to be advised of the general nature of any evidence in the FBI report which might defeat his claim. In response to his question, the Hearing Officer told him that there was nothing unfavorable in it. The Hearing Officer's report, which was transmitted to the appeal board, corroborates this view. Nothing in the FBI report was transmitted to the appeal board, and thus it was given no indication that the FBI report was unfavorable.

[11] See *United States* v. *Geyer*, 108 F. Supp. 70 (D. Conn. 1952), an opinion heavily relied upon by the Court of Appeals in its opinion in the *Nugent* case.

which Congress has imposed upon the Department of Justice in § 6 (j).[12]

The duty to classify—to grant or deny exemptions to conscientious objectors—rests upon the draft boards, local and appellate, and not upon the Department of Justice. The registrant must first look to his local board for the relief he claims; he must convince this body—composed of representatives of his own community—of the depth and sincerity of his convictions. He must fill out forms, calculated to put him to the test;[13] he must supply any additional detailed information which may be necessary for a searching investigation of his claim; and, if he or his local board demands it, he may appear in person to explain his position to the persons charged with determining its validity.[14]

If the local board denies the claim, the responsibility for review, if sought, falls upon the appeal board. The Department of Justice takes no action which is decisive. Its duty is to advise, to render an auxiliary service to the appeal board in this difficult class of cases. Congress was under no compulsion to supply this auxiliary service—to provide for a more exhaustive processing of the conscientious objector's appeal. Registrants who claim exemption for some reason other than conscientious objection, and whose claims are denied, are entitled to no "hearing" before the Department. Yet in this special class of cases, involving as it does difficult analyses of facts and individ-

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[12] *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294 (1933).

[13] The Selective Service System requires conscientious objectors to fill out a special form. This form supplies the registrant with the opportunity to demonstrate—by pointing to past examples, referring to character witnesses and recounting the background of his training and beliefs—the sincerity of his claim.

[14] 32 CFR (1949 ed.) Part 1624.

ualized judgments, Congress directed that the assistance of the Department be made available whenever a registrant insists that his conscientious objection claim has been misjudged by his local board. Observers sympathetic to the problems of the conscientious objector have recognized that this provision in the statute improves the system of review by helping the appeal boards to reach a more informed judgment on the appealing registrant's claims.[18] But it has long been recognized that neither the Department's "appropriate investigation" nor its "hearing" is the determinative investigation and the determinative hearing in each case. It has regularly been assumed that it is not the function of this auxiliary procedure to provide a full-scale trial for each appealing registrant.

Accordingly, the standards of procedure to which the Department must adhere are simply standards which will enable it to discharge its duty to forward sound advice, as expeditiously as possible, to the appeal board. Certainly, this is an important and delicate responsibility, but we do not think the statute requires the Department to entertain an all-out collateral attack at the hearing on the testimony obtained in its prehearing investigation.

Respondents urge that they have a right to such a procedure under the Fifth Amendment. We cannot agree.

The Selective Service Act is a comprehensive statute designed to provide an orderly, efficient and fair procedure to marshal the available manpower of the country, to impose a common obligation of military service on all physically fit young men. It is a valid exercise of the war power. It is calculated to function—it functions today—in times of peril. Even so, Congress took care to provide special treatment for those who could not

[18] See Sibley and Jacob, Conscription of Conscience (1952), 71–76.

reconcile participation in the defense effort with their religious beliefs—if those beliefs were a matter of sincere conviction. Profiting from the experiences of the First World War, Congress adopted a new and special procedure to secure the rights of conscience, which had been given express statutory recognition.

It is always difficult to devise procedures which will be adequate to do justice in cases where the sincerity of another's religious convictions is the ultimate factual issue. It is especially difficult when these procedures must be geared to meet the imperative needs of mobilization and national vigilance—when there is no time for "litigious interruption." *Falbo* v. *United States*, 320 U. S. 549, 554 (1944). Under the circumstances presented, we cannot hold that the statute, as we construe it, violates the Constitution.[16]

The judgments are

Reversed.

MR. JUSTICE JACKSON took no part in the consideration or decision of this case.

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS join, dissenting.

That so strong a court and one so strong in literary endowment—Swan, C. J., Learned Hand and Frank, JJ.—should rely, as did the Court of Appeals in this case, 200 F. 2d 46, 49–50, on the opinion of a District Judge, impressively attests the persuasiveness of that opinion. Chief Judge Hincks has stated also for me the compelling reasons why the refusal to make available the FBI report on a registrant claiming exemption as a conscientious

[16] Cf. *Norwegian Nitrogen Products Co.* v. *United States*, *supra*; *Williams* v. *New York*, 337 U. S. 241 (1949).

objector invalidates, on any fair construction of the requirements of the Selective Service Act, his classification as 1–A.

"It is true that on the precise point of law involved the [Selective Service] Act is not explicit: when it directs the board to refer the registrant's claim of conscientious objection 'for inquiry and hearing' by the Department [of Justice], it does not specify that the product both of the inquiry and of the hearing shall be made available to the board. But neither does the Act suggest any reason why the product of the hearing should go forward to the board, as it did here as a matter of course, and the product of the inquiry should be withheld.

"There are, however, other provisions in the Act from which I think one must imply a Congressional intent that the board should have access to the investigative report. The same section of the Act proceeds to provide that after inquiry a hearing shall be had of which the registrant shall be notified. The natural import of this provision is, I think, that the investigative report resulting from the inquiry shall be made a part of the record for consideration by all directly concerned with the classification. Under the contemplated procedure the registrant has already had an opportunity before the draft board to put everything desired into the record. That being so there would be no point to notify him to appear in the departmental hearing just to put in more evidence. Thus, by elimination, the only useful purpose of notice at that stage was to give the registrant opportunity to meet the contents of the report. . . .

. . . . .

"Congress was not using empty words when in Sec. 451 of the Act it solemnly declared 'that in a

> free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy.' A system in which selections might be made in uninformed reliance upon the recommendation of an executive officer bottomed perhaps on secret police reports, would indeed make a mockery of that high declaration of policy. Only if the Act be construed to require that the investigative reports shall become a part of the record open to the appeal board and all concerned is the 'system of selection . . . fair and just' within our Anglo-Saxon concepts of justice and due process." *United States* v. *Geyer*, 108 F. Supp. 70, 71–72.

There is a note of uneasiness in the Court's recognition of the difficulty of "devising" procedures "adequate to do justice in cases where the sincerity of another's religious convictions" is in issue. Courts are, no doubt, closely circumscribed in "devising" such procedures where Congress has, with sufficient clarity, bound the allowable judicial discretion in applying legislation. And, of course, only within narrow limits may courts reject a procedure, devised by Congress, on constitutional grounds. The Due Process Clause cannot be bent to what a judge may privately think is wisdom in respecting dissident views. But here the Court ought not to feel an impotent uneasiness. It is not called upon to devise a just procedure; merely to apply one. Considering the traditionally high respect that dissent, and particularly religious dissent, has enjoyed in our view of a free society, this Court ought not to reject a construction of congressional language which assures justice in cases where the sincerity of another's religious conviction is at stake and where prison

may be the alternative to an abandonment of conscience. The enemy is not yet so near the gate that we should allow respect for traditions of fairness, which has heretofore prevailed in this country, to be overborne by military exigencies.

The suggestion that the registrants in these cases have waived their rights by not asking for "a fair résumé" of any adverse evidence in the investigator's report seems to me an instance of keeping the word of promise to the ear and breaking it to the hope. The very purpose of a hearing is to give registrants an opportunity to meet adverse evidence. It makes a mockery of that purpose to suggest that such adverse evidence can be effectively met if its provenance is unknown. Nor is it possible to be confident that a "résumé is fair" when one cannot know what it is a résumé of. This does not suggest purposeful unfairness, still less, want of zeal. Language is treacherous and the meaning of what is written to no small degree derives from him who reads it. In a country with our moral and material strength the maintenance of fair procedures cannot handicap our security. Every adherence to our moral professions reinforces our strength and therefore our security.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK concurs, dissenting.

I concur in MR. JUSTICE FRANKFURTER'S opinion and only add a word. The use of statements by informers who need not confront the person under investigation or accusation has such an infamous history that it should be rooted out from our procedure. A hearing at which these faceless people are allowed to present their whispered rumors and yet escape the test and torture of cross-examination is not a hearing in the Anglo-American sense. We should be done with the practice—whether

the life of a man is at stake, or his reputation, or any matter touching upon his status or his rights. If FBI reports are disclosed in administrative or judicial proceedings, it may be that valuable underground sources will dry up. But that is not the choice. If the aim is to protect the underground of informers, the FBI report need not be used. If it is used, then fairness requires that the names of the accusers be disclosed. Without the identity of the informer the person investigated or accused stands helpless. The prejudices, the credibility, the passions, the perjury of the informer are never known. If they were exposed, the whole charge might wither under the cross-examination.

DALEHITE ET AL. *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 308. Argued April 6–8, 1953.—Decided June 8, 1953.

In this action against the United States under the Tort Claims Act to recover damages for a death resulting from the disastrous explosion at Texas City, Tex., of ammonium nitrate fertilizer produced at the instance, according to the specifications and under the control of the United States, for export to increase the food supply in areas under military occupation following World War II, the District Court found that the explosion resulted from negligence on the part of the Government in adopting the fertilizer export program as a whole, in its control of various phases of manufacturing, packaging, labeling and shipping the product, in failing to give notice of its dangerous nature to persons handling it and in failing to police its loading on shipboard. *Held:* As a matter of law, the facts found by the District Court cannot give it jurisdiction of the cause under the Act, because the claim is "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government," within the meaning of 28 U. S. C. § 2680 (a), which makes the Act inapplicable to such claims. Pp. 17–45.

(a) The legislative history of the Act discloses that § 2680 (a) was included to assure protection for the Government against tort liability for errors in administration or in the exercise of discretionary functions. Pp. 24–30.

(b) The "discretionary function or duty" that cannot form a basis for suit under the Act includes more than the initiation of programs and activities; it also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable. Pp. 30–36.

(c) The acts of "negligence" found by the District Court do not subject the Government to liability, because the decisions found culpable were all responsibly made in the exercise of judgment at a planning rather than an operational level and involved

considerations more or less important to the practicability of the Government's fertilizer program. Pp. 37–42.

(d) The District Court's finding that the Coast Guard and other agencies were negligent in failing to prevent the fire by regulating storage or loading of the fertilizer is classically within the exception relating to acts based on legislative judgment. Pp. 42–43.

(e) The alleged failure in fighting the fire is also outside the coverage of the Act, for the Act did not change the normal rule that an alleged failure or carelessness of public firemen does not create private actionable rights. Pp. 43–44.

(f) Since the Act may be invoked only on a "negligent or wrongful act or omission" of an employee, it created no absolute liability of the Government by virtue of its ownership of an "inherently dangerous commodity" or property, or of its engaging in an "extra-hazardous" activity. Pp. 44–45.

197 F. 2d 771, affirmed.

In this action against the United States under the Tort Claims Act, the District Court awarded a judgment to plaintiffs. The Court of Appeals reversed. 197 F. 2d 771. This Court granted certiorari. 344 U. S. 873. *Affirmed*, p. 45.

John Lord O'Brian and *Howard C. Westwood* argued the cause for Dalehite et al., petitioners. With them on the brief were *Thomas Fletcher, Neth L. Leachman, T. E. Mosheim, John R. Brown, M. S. McCorquodale, Vernon Elledge, Wm. Merrick Parker, W. Graham Claytor, Jr.* and *Stanley L. Temko.*

Austin Y. Bryan, Jr. argued the cause for the Pan-American Refining Corporation et al., petitioners. With him on the brief were *George D. Vail, Jr.* and *David Bland.*

Morton Liftin and *Oscar H. Davis* argued the cause for the United States. With them on the brief were *Acting Solicitor General Stern, Assistant Attorney General Burger, Judge Advocate General Brannon, Assistant Judge Advocate General Mickelwait, Paul A. Sweeney, Marvin*

E. Frankel, Massillon M. Heuser, Morton Hollander, Herman Marcuse, Lester S. Jayson, Cornelius J. Peck, Eberhard P. Deutsch, Burton K. Philips and *William I. Connelly.*

MR. JUSTICE REED delivered the opinion of the Court.

Petitioners seek damages from the United States for the death of Henry G. Dalehite in explosions of fertilizer with an ammonium nitrate base, at Texas City, Texas, on April 16 and 17, 1947. This is a test case, representing some 300 separate personal and property claims in the aggregate amount of two hundred million dollars. Consolidated trial was had in the District Court for the Southern District of Texas on the facts and the crucial question of federal liability generally. This was done under an arrangement that the result would be accepted as to those matters in the other suits. Judgment was rendered following separate proof of damages for these individual plaintiffs in the sum of $75,000. Damages in the other claims remain to be determined. The Court of Appeals for the Fifth Circuit unanimously reversed, however, *In re Texas City Disaster Litigation*, 197 F. 2d 771, and we granted certiorari, 344 U. S. 873, because the case presented an important problem of federal statutory interpretation.

The suits were filed under the Federal Tort Claims Act, 28 U. S. C. §§ 1346, 2671–2678, 2680. That Act waived sovereign immunity from suit for certain specified torts of federal employees. It did not assure injured persons damages for all injuries caused by such employees.

The Act provides that the federal district courts, "[s]ubject to the provisions of [the act]," are to have:

> "exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or

> loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." § 1346 (b).

There is an exception from the scope of this provision. Section 2680 reads:

> "The provisions of this chapter and section 1346 (b) of this title shall not apply to—
>
> "(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

Suing under this grant of jurisdiction, the plaintiffs claimed negligence, substantially on the part of the entire body of federal officials and employees involved in a program of production of the material—Fertilizer Grade Ammonium Nitrate (FGAN hereafter)—in which the original fire occurred and which exploded. This fertilizer had been produced and distributed at the instance, according to the specifications and under the control of the United States.

The adaptability of the material for use in agriculture had been recognized long prior to 1947. The Government's interest in the matter began in 1943 when the TVA, acting under its statutory delegation to undertake experiments and "manufacture" fertilizer, 48 Stat. 61, 16

U. S. C. § 831d, first began production for commercial purposes.[1] TVA used plant facilities formerly used for production of ammonium nitrate for explosives. In the year 1943, the War Production Board, responsible for the production and allocation of war materials, Exec. Order 9024, January 16, 1942, 7 Fed. Reg. 329, instituted a program of yearly production of 30,000 tons a month of FGAN for private domestic agricultural use through plants no longer required for ammunition production. Administration was to be carried on through the Army's Bureau of Ordnance. The TVA specifications were followed and advice given by its experts. This early production for domestic use furnished a test for manufacture and utility of FGAN.

The particular FGAN involved at Texas City came to be produced for foreign use for these reasons: Following the World War II hostilities, the United States' obligations as an occupying power,[2] and the danger of internal unrest, forced this Government to deal with the problem of feeding the populations of Germany, Japan and Korea. Direct shipment of foodstuffs was impractical; available fertilizer was in short supply, and requirements from the United States were estimated at about 800,000 tons. However, some 15 ordnance plants had been deactivated and turned over to the War Assets Administration, 44 CFR, 1949, Part 401, for disposal. Under Secretary of War Royall suggested in May of 1946, and Secretary Patterson agreed, that these be used for production of fertilizer needed for export.[3] The Director of

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[1] The Hercules Powder Company held the original Cairns Explosive Patent on the FGAN process, which contemplated a product substantially similar to that finally produced by the Government including the use of an organic insulator. See p. 21, *infra*.

[2] The Hague Conventions of 1899 (II) and 1907 (IV) Respecting the Laws and Customs of War on Land, Article 43.

[3] These were capable of producing 70,000 tons a month.

the Office of War Mobilization and Reconversion, 58 Stat. 785, 50 U. S. C. App. § 1651 *et seq.* (1946 ed.), acting under the power delegated by the President in Exec. Order 9347, May 27, 1943, 8 Fed. Reg. 7207, and Exec. Order 9488, October 3, 1944, 9 Fed. Reg. 12145, ordered the plants into operation. Cabinet approval followed. The War Department allocated funds from its appropriations for "Supplies" and "Military Posts" for 1946; direct appropriations for relief in the occupied areas were made by Congress in the following year.* The Army's Chief of Ordnance was delegated the responsibility for carrying out the plan, and was authorized particularly to enter into cost-plus-fixed-fee contracts with private companies for the operation of the plants' facilities. He in turn appointed the Field Director of Ammunition Plants (FDAP) to administer the program. Thereafter the Department entered into a number of contracts with private firms—including the du Pont Co. and Hercules Powder Co.—to "operate the installation . . . described herein for the graining of ammonium nitrate (fertilizer grade)," but subjecting "the work to be done by the Contractor . . . to the general supervision, direction, control and approval of the Contracting Officer." A detailed set of specifications was drawn up and sent to each plant which included FDAP "Specifications for Products" and a similar TVA paper. Army personnel were appointed for each plant. These were responsible for the application of these specifications, liaison with supply officials,

* Military Appropriation Act of 1946, 59 Stat. 384, 390, 395 (1945), and Military Appropriation Act of 1947, 60 Stat. 541, 560 (1946). The latter was mentioned as directed toward the fertilizer program. Hearings before a Subcommittee of the Senate Committee on Appropriations on H. R. 6837, 79th Cong., 2d Sess. 16, 85. See also H. J. Res. 153, 61 Stat. 125, May 31, 1947, specifically appropriating moneys for relief assistance of all kinds.

and satisfaction of production schedules, pursuant to an Army Standard Operating Procedure. Beyond this, operations were controlled by the administering corporation which supplied the personnel and production experience required.[5]

FGAN's basic ingredient was ammonium nitrate, long used as a component in explosives. Its adaptability as a fertilizer stemmed from its high free nitrogen content. Hercules Powder Company had first manufactured a fertilizer compound in this form on the basis of Cairns' Explosive Patent, No. 2,211,738, of August 13, 1940. The Cairns process contemplates a product substantially identical to the Texas City FGAN. The process was licensed to the United States. The Government produced ammonium nitrate at certain other federal plants, and shipped it in solution to the reactivated graining centers for concentration. Thereafter, in addition to clay, a mixture of petrolatum, rosin and paraffin (PRP hereafter) was added to insure against caking through water absorption. The material was then grained to fertilizer specification, dried and packaged in 6-ply paper bags, marked "Fertilizer (Ammonium Nitrate)."

At the inception of the program, however, it appeared that these particular plants were unable to produce sufficient quantities of fertilizer to meet the early needs of the planned allocation. So early shipments to the occupied territories were made up of lots privately produced, and released to the War Department by the Combined Food Board and purchased by the United States, pursuant to an allocation arrangement approved by the Board acting through the Civilian Production Administration, established by Exec. Order 9638, October 4, 1945, 10 Fed. Reg. 12591. Thereafter the private producers could

[5] By 1946, at least two companies in addition to Hercules were producing FGAN commercially.

replenish their supply for private sale by purchasing government-produced FGAN, if they so desired.

The particular FGAN transported to Texas City had been produced at three of the plants activated by the Government for the foreign fertilizer program, and allotted to the Lion Oil Co., which had previously sold FGAN to the Army pursuant to their sell-back agreement. The agreement provided that title was to pass to Lion on payment. The original contract of sale to the Army having provided that Lion could designate a recipient other than itself for the replacement FGAN, Lion contracted with the Walsen Company for resale. Walsen operated as broker for the French Supply Council representing the French Government which had secured a preferential fertilizer allocation from the Civilian Production Administration. Pursuant thereto Walsen transmitted the French shipping orders to Lion who turned them over to the Army for execution. The FGAN was consigned to the French Supply Council at Texas City by government bills of lading. The Council insured the shipment in its own name, arranged for credit with New York banks and assigned part thereof to Lion, sufficient to cover the shipments here involved, payable on presentation of shipping documents. It also directed Lion to "consign all lots French Supply Council for storage and eventual exportation Texas City Terminal Texas."

By April 15, 1947, following three weeks' warehouse storage at Texas City on orders of the French Council, some 1,850 tons of the FGAN thus resold had been loaded on the French Government-owned steamship *Grandcamp*, and some 1,000 tons on the privately owned *High Flyer* by independent stevedores hired by the French.[6] The *Grandcamp* carried in addition a substan-

[6] Seventy-five thousand tons of FGAN had been shipped through Texas City during the previous six months.

tial cargo of explosives, and the *High Flyer* 2,000 tons of sulphur at the time. At about 8:15 a. m. of the next day smoke was sighted in the *Grandcamp* hold and all efforts to halt the fire were unavailing.[7] Both ships exploded and much of the city was leveled and many people killed.

Since no individual acts of negligence could be shown, the suits for damages that resulted necessarily predicated government liability on the participation of the United States in the manufacture and the transportation of FGAN. Following the disaster, of course, no one could fail to be impressed with the blunt fact that FGAN would explode. In sum, petitioners charged that the Federal Government had brought liability on itself for the catastrophe by using a material in fertilizer which had been used as an ingredient of explosives for so long that industry knowledge gave notice that other combinations of ammonium nitrate with other material might explode. The negligence charged was that the United States, without definitive investigation of FGAN properties, shipped or permitted shipment to a congested area without warning of the possibility of explosion under certain conditions. The District Court accepted this theory. His judgment was based on a series of findings of causal negligence which, for our purposes, can be roughly divided into three kinds—those which held that the Government had been careless in drafting and adopting the fertilizer export plan as a whole, those which found specific negligence in various phases of the manufacturing process and those which emphasized official dereliction of duty in failing to

[7] The *Grandcamp* exploded about an hour after the fire was noticed. Meanwhile the captain of the ship had ordered all personnel off and the hatches closed. Steam was introduced into the holds. All admit that this is normal fire-fighting procedure aboard ships, but that it was less than effective in this case because of the oxidizing properties of the FGAN. Whether or not the captain was negligent this Court is not called upon to say.

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police the shipboard loading. The Court of Appeals *en banc* unanimously reversed, but since only three of the six judges explicitly rejected the bulk of these findings, we shall consider the case as one in which they come to us unimpaired. Cf. *Labor Board* v. *Pittsburgh Steamship Co.*, 340 U. S. 498, 503; *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 395. Even assuming their correctness *arguendo*, though, it is our judgment that they do not establish a case within the Act.[6] This is for the reason that as a matter of law the facts found cannot give the District Court jurisdiction of the cause under the Tort Claims Act.

I. The Federal Tort Claims Act was passed by the Seventy-ninth Congress in 1946 as Title IV of the Legislative Reorganization Act, 60 Stat. 842, after nearly thirty years of congressional consideration. It was the offspring of a feeling that the Government should assume the obligation to pay damages for the misfeasance of employees in carrying out its work. And the private bill device was

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[6] We are therefore not required to weigh each finding anew as "clearly erroneous." They were characterized below as "profuse, prolific, and sweeping." We agree. Fed. Rules Civ. Proc., Rule 52 (a), in terms, contemplates a system of findings which are "of fact" and which are "concise." The well-recognized difficulty of distinguishing between law and fact clearly does not absolve district courts of their duty in hard and complex cases to make a studied effort toward definiteness. Statements conclusory in nature are to be eschewed in favor of statements of the preliminary and basic facts on which the District Court relied. *Kelley* v. *Everglades Drainage District*, 319 U. S. 415, and cases cited. Otherwise, their findings are useless for appellate purposes. In this particular case, no proper review could be exercised by taking the "fact" findings of "negligence" at face value. And, to the extent that they are of law, of course they are not binding on appeal. *E. g., Great Atlantic & Pacific Tea Co.* v. *Supermarket Equipment Corp.*, 340 U. S. 147, 153–154, and concurring opinion at 155–156.

notoriously clumsy.[9] Some simplified recovery procedure for the mass of claims was imperative. This Act was Congress' solution, affording instead easy and simple access to the federal courts for torts within its scope.[10]

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[9] "In the Sixty-eighth Congress about 2,200 private claim bills were introduced, of which 250 became law . . . .

"In the Seventieth Congress 2,268 private claim bills were introduced, asking more than $100,000,000. Of these, 336 were enacted, appropriating about $2,830,000, of which 144, in the amount of $562,000, were for tort.

"In each of the Seventy-fourth and Seventy-fifth Congresses over 2,300 private claim bills were introduced, seeking more than $100,000,000. In the Seventy-sixth Congress approximately 2,000 bills were introduced, of which 315 were approved, for a total of $826,000.

"In the Seventy-seventh Congress, of the 1,829 private claim bills introduced and referred to the Claims Committee, 593 were approved for a total of $1,000,253.30. In the Seventy-eighth Congress 1,644 bills were introduced; 549 of these were approved for a total of $1,355,767.12." H. R. Rep. No. 1287, 79th Cong., 1st Sess., p. 2.

[10] Certain tentative experiments in this direction should be noted. In 1855, Congress established the Court of Claims and consented to suit therein on claims based on contract or federal law or regulation. This consent was enlarged in 1887 to include all cases for damages not sounding in tort. At the same time, United States District Courts were given concurrent jurisdiction of claims up to $10,000. In 1910, Congress consented to suits in the Court of Claims for patent infringement. When the Government took over the operation of the railroads during the First World War, Congress made the United States subject to the same responsibility for property damage, personal injury, and death as the private owners would have been. In 1920 and 1925, the Government consented to suits in the district courts upon admiralty and maritime torts involving government vessels, without limitation as to amount.

From the Committee hearings we learn that the previous 85 years had witnessed a steady encroachment upon the originally unbroken domain of sovereign immunity from legal process for the delicts of its agents. Yet a large and highly important area remained in which no satisfactory remedy had been provided for the wrongs of government officers or employees, the ordinary "common law" type of tort,

The meaning of the governmental regulatory function exception from suits, § 2680 (a), shows most clearly in the history of the Tort Claims Bill in the Seventy-seventh Congress. The Seventy-ninth, which passed the Act, held no relevant hearings. Instead, it integrated the language of the Seventy-seventh Congress, which had first considered the exception, into the Legislative Reorganization Act as Title IV.

Earlier tort claims bills considered by Congress contained reservations from the abdication of sovereign immunity. Prior to 1942 these exceptions were couched in terms of specific spheres of federal activity, such as postal service, the activities of the Securities and Exchange Commission, or the collection of taxes.[11] In 1942, however, the Seventy-seventh Congress drafted a twofold elimination of claims based on the execution of a regulation or statute or on the exercise of a discretionary function. The language of the bills then introduced in both the House and Senate, in fact, was identical with that of § 2680 (a) as adopted.[12] The exception was drafted as a clarifying amendment to the House bill to assure protection for the

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such as personal injury or property damage caused by the negligent operation of an automobile. Hearings before the House Committee on the Judiciary on H. R. 5373 and H. R. 6463, 77th Cong., 2d Sess., p. 24.

[11] Such specific exceptions appeared first as an amendment to H. R. 9285, 70th Cong., 1st Sess. The amendment was offered from the floor of the House, 69 Cong. Rec. 3131. See also H. R. 7236 and S. 2690, 76th Cong., 1st Sess.; H. R. 5373, 77th Cong., 2d Sess.

[12] H. R. 6463, 77th Cong., 2d Sess.; S. 2207, 77th Cong., 2d Sess. The first broad governmental exemption was considered in S. 4567, 72d Cong., 1st Sess., and in S. 1833, 73d Cong., 1st Sess., where it was provided that the Government should not be liable for "[a]ny claim on account of the effect or alleged effect of an Act of Congress, Executive order of the President, or of any department or independent establishment."

Government against tort liability for errors in administration or in the exercise of discretionary functions.[13] An Assistant Attorney General, appearing before the Committee especially for that purpose,[14] explained it as avoiding "any possibility that the act may be construed to authorize damage suits against the Government growing out of a legally authorized activity," merely because "the same conduct by a private individual would be tortious." It was not "intended that the constitutionality of legislation, the legality of regulations, or the propriety of a discretionary administrative act, should be tested through the medium of a damage suit for tort. The same holds true of other administrative action not of a regulatory nature, such as the expenditure of Federal funds, the execution of a Federal project and the like." [15] Referring to a prior bill which had not contained the "discretionary function" exemption, the House Committee on the Judiciary was advised that "the cases embraced within [the new] subsection would have been exempted from [the prior bill] by judicial construction. It is not probable that the courts would extend a Tort Claims Act into the realm of the validity of legislation or discretionary administrative action, but H. R. 6463 makes this specific." [16]

The legislative history indicates that while Congress desired to waive the Government's immunity from actions for injuries to person and property occasioned by the tortious conduct of its agents acting within their scope of

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[13] Hearings before the House Committee on the Judiciary on H. R. 5373 and H. R. 6463, 77th Cong., 2d Sess., pp. 1, 4.

[14] Hearings before the House Committee on the Judiciary, 77th Cong., 2d Sess., on H. R. 5373 and H. R. 6463, p. 6.

[15] *Ibid.*, pp. 25, 33.

[16] Statement by the then Assistant Attorney General Francis M. Shea at Hearings before the Committee on the Judiciary, H. of Rep., 77th Cong., 2d Sess., on H. R. 5373 and H. R. 6463, p. 29.

business,[17] it was not contemplated that the Government should be subject to liability arising from acts of a governmental nature or function.[18] Section 2680 (a) draws this distinction. Uppermost in the collective mind of Congress were the ordinary common-law torts.[19] Of these, the example which is reiterated in the course of the repeated proposals for submitting the United States to tort liability is "negligence in the operation of vehicles." [20] On the other hand the Committee's reports explain the boundaries of the sovereign immunity waived, as defined

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[17] Hearings before a Subcommittee of the House Committee on Claims, 72d Cong., 1st Sess., on a general tort bill, p. 17; Hearings before Subcommittee No. 1 of the House Committee on the Judiciary on H. R. 7236, 76th Cong., 3d Sess., pp. 5, 16; Hearings before a Subcommittee of the Senate Committee on the Judiciary on S. 2690, 76th Cong., 3d Sess., p. 27; Hearings before the House Committee on the Judiciary on H. R. 5373 and H. R. 6463, 77th Cong., 2d Sess., pp. 28, 37, 39, 66; H. R. Rep. No. 2428, 76th Cong., 3d Sess., p. 3; H. R. Rep. No. 2245, 77th Cong., 2d Sess., p. 10; H. R. Rep. No. 1287, 79th Cong., 1st Sess., p. 5; S. Rep. No. 1400, 79th Cong., 2d Sess., p. 31.

[18] H. R. Rep. No. 2800, 71st Cong., 3d Sess., p. 13; Hearings on H. R. 5373 and H. R. 6463, 77th Cong., 2d Sess., pp. 28, 33, 38, 45, 65–66; S. Rep. No. 1196, 77th Cong., 2d Sess., p. 7; H. R. Rep. No. 1287, 79th Cong., 1st Sess., p. 5; 86 Cong. Rec. 12021–12022.

[19] That congressional thought was centered on granting relief for the run-of-the-mine accidents, as distinguished from injury from performing discretionary governmental functions, is indicated by the message of President Franklin D. Roosevelt in 1942 to the 77th Congress recommending passage of a tort claims statute. The President favored a $7,500 limit on jurisdiction and spoke chiefly of the interference from numerous bills introduced—around two thousand each Congress—and the simplification of procedure for recovery. 88 Cong. Rec. 313–314.

[20] H. R. Rep. No. 2428, 76th Cong., 3d Sess., p. 3; Hearings on H. R. 5373 and H. R. 6463, 77th Cong., 2d Sess., p. 66; Hearings on H. R. 7236, 76th Cong., 3d Sess., pp. 7, 16, 17; Hearings on S. 2690, 76th Cong., 3d Sess., p. 9; 69 Cong. Rec. 2192, 2193, 3118; 86 Cong. Rec. 12024. See also note 8.

by this § 2680 exception, with one paragraph which appears time and again after 1942, and in the House Report of the Congress that adopted in § 2680 (a) the limitation in the language proposed for the 77th Congress.[21] It was adopted by the Committee in almost the

[21] See H. R. Rep. No. 2245, 77th Cong., 2d Sess., p. 10; S. Rep. No. 1196, 77th Cong., 2d Sess., p. 7; H. R. Rep. No. 1287, 79th Cong., 1st Sess., pp. 5–6; Hearings before House Com. on Judiciary on H. R. 5373 and H. R. 6463, 77th Cong., 2d Sess., p. 33. The paragraph reads as follows:

"Section 402 specifies the claims which would not be covered by the bill.

"The first subsection of section 402 exempts from the bill claims based upon the performance or nonperformance of discretionary functions or duties on the part of a Federal agency or Government employee, whether or not the discretion involved be abused, and claims based upon the act or omission of a Government employee exercising due care in the execution of a statute or regulation, whether or not valid. This is a highly important exception, intended to preclude any possibility that the bill might be construed to authorize suit for damages against the Government growing out of an authorized activity, such as a flood-control or irrigation project, where no negligence on the part of any Government agent is shown, and the only ground for suit is the contention that the same conduct by a private individual would be tortious, or that the statute or regulation authorizing the project was invalid. It is also designed to preclude application of the bill to a claim against a regulatory agency, such as the Federal Trade Commission or the Securities and Exchange Commission, based upon an alleged abuse of discretionary authority by an officer or employee, whether or not negligence is alleged to have been involved. To take another example, claims based upon an allegedly negligent exercise by the Treasury Department of the blacklisting or freezing powers are also intended to be excepted. The bill is not intended to authorize a suit for damages to test the validity of or provide a remedy on account of such discretionary acts even though negligently performed and involving an abuse of discretion. Nor is it desirable or intended that the constitutionality of legislation, or the legality of a rule or regulation should be tested through the medium of a damage suit for tort. However, the common-law torts of employees of regulatory agencies would be included within the

language of the Assistant Attorney General's explanation. This paragraph characterizes the general exemption as "a highly important exception, intended to preclude any possibility that the bill might be construed to authorize suit for damages against the Government growing out of an authorized activity, such as a flood-control or irrigation project, where no negligence on the part of any Government agent is shown, and the only ground for suit is the contention that the same conduct by a private individual would be tortious . . . . The bill is not intended to authorize a suit for damages to test the validity of or provide a remedy on account of such discretionary acts even though negligently performed and involving an abuse of discretion."

II. Turning to the interpretation of the Act, our reasoning as to its applicability to this disaster starts from the accepted jurisprudential principle that no action lies against the United States unless the legislature has authorized it.[22] The language of the Act makes the United States liable "respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances." 28 U. S. C. § 2674. This statute is another example of the progressive relaxation by legislative enactments of the rigor of the immunity rule. Through such statutes that change the law, organized government

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scope of the bill to the same extent as torts of nonregulatory agencies. Thus, section 402 (5) and (10), exempting claims arising from the administration of the Trading With the Enemy Act or the fiscal operations of the Treasury, are not intended to exclude such common-law torts as an automobile collision caused by the negligence of an employee of the Treasury Department or other Federal agency administering those functions."

[22] *Feres* v. *United States*, 340 U. S. 135, 139; *United States* v. *Shaw*, 309 U. S. 495; *United States* v. *Eckford*, 6 Wall. 484. Cf. Blackstone, Book I, c. 7 (Sovereignty).

expresses the social purposes that motivate its legislation. Of course, these modifications are entitled to a construction that will accomplish their aim,[23] that is, one that will carry out the legislative purpose of allowing suits against the Government for negligence with due regard for the statutory exceptions to that policy. In interpreting the exceptions to the generality of the grant, courts include only those circumstances which are within the words and reason of the exception.[24] They cannot do less since petitioners obtain their "right to sue from Congress [and they] necessarily must take it subject to such restrictions as have been imposed." *Federal Housing Administration* v. *Burr*, 309 U. S. 242, 251.

So, our decisions have interpreted the Act to require clear relinquishment of sovereign immunity to give jurisdiction for tort actions.[25] Where jurisdiction was clear,

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[23] *United States* v. *Yellow Cab Co.*, 340 U. S. 543, 555; *Keifer & Keifer* v. *Reconstruction Finance Corporation*, 306 U. S. 381.

[24] *United States* v. *Dickson*, 15 Pet. 141, 165; *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 571; *A. H. Phillips, Inc.* v. *Walling*, 324 U. S. 490, 493.

[25] In *Feres* v. *United States*, 340 U. S. 135, this Court held that the Act did not waive immunity for tort actions against the United States for injuries to three members of the Armed Forces while on active duty. The injuries were allegedly caused by negligence of employees of the United States. The existence of a uniform compensation system for injuries to those belonging to the armed services led us to conclude that Congress had not intended to depart from this system and allow recovery by a tort action dependent on state law. Recovery was permitted by a service man for nonservice disabilities in *Brooks* v. *United States*, 337 U. S. 49.

In *United States* v. *Spelar*, 338 U. S. 217, we held that our courts did not have jurisdiction to try a tort action for injury by a federal employee to a complainant because of an accident at our air base in Newfoundland. This conclusion was reached because of the exception, § 2680 (k), of "Any claim arising in a foreign country." The sovereignty of the United States did not extend over the base.

though, we have allowed recovery despite arguable procedural objections.[26]

One only need read § 2680 in its entirety to conclude that Congress exercised care to protect the Government from claims, however negligently caused, that affected the governmental functions. Negligence in administering the Alien Property Act, or in establishing a quarantine, assault, libel, fiscal operations, etc., was barred. An analysis of § 2680 (a), the exception with which we are concerned, emphasizes the congressional purpose to except the acts here charged as negligence from the authorization to sue.[27] It will be noted from the form of the section, see p. 18, *supra*, that there are two phrases describ-

[26] *United States* v. *Aetna Casualty & Surety Co.*, 338 U. S. 366. Insurance Company, as subrogee of the person injured, may bring suit under the Act in spite of Anti-Assignment Statute.

United States v. *Yellow Cab Co.*, 340 U. S. 543. United States may be sued for contribution, and also be impleaded as a third party defendant.

[27] The statute is unique in Anglo-American jurisprudence in its explicit exception for discretion. The English Crown Proceedings Act, 1947, contains nothing directly comparable, though see § 11, saving the "prerogative of the Crown," 6 Halsbury's Statutes of England (2d ed.) 56. The extent of this provision is not entirely clear, but 6 Halsbury's Laws of England (2d ed.) 443–590, assumes the term to cover a wide area of official activities, including "the rules and regulations [and] the exercise of discretionary authority" by "the customary officers and departments," under parliamentary enactments. *Ibid.*, 459–460. Street, Tort Liability of the State, 47 Mich. L. Rev. 341, 353, however, seems to indicate that the principal protection for the exercise of official discretion will come through the accepted principles of the common law as to torts of public officials acting within their delegated authority. See also Barnes, The Crown Proceedings Act, 1947, 26 Canadian Bar Review 387, 390, and The Crown Proceedings Act, 1950, 28 New Zealand L. J. 49, 50, 52–53.

Australia and New Zealand had had similar statutes for some years. They left "open to grave doubt how far, if at all, it was intended by those Acts to give the subject rights of action which

ing the excepted acts of government employees. The first deals with acts or omissions of government employees, exercising due care in carrying out statutes or regulations whether valid or not. It bars tests by tort action of the legality of statutes and regulations. The second is applicable in this case. It excepts acts of discretion in the performance of governmental functions or duty "whether or not the discretion involved be abused." Not only agencies of government are covered but all employees exercising discretion.[28] It is clear that the just-quoted clause as to abuse connotes both negligence and wrongful acts in the exercise of the discretion because the Act itself covers only "negligent or wrongful act or omission of any employee," "within the scope of his office" "where the United States, if a private person, would be liable." 28 U. S. C. § 1346 (b). The exercise of discretion could not be abused without negligence or a wrongful act. The Committee reports, note 21, *supra*, show this. They say § 2680 (a) is to preclude action for "abuse of discretionary authority . . . whether or not negligence is alleged to have been involved." They speak of excepting a "remedy on account of such discretionary

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in the result would interfere seriously with the ordinary administrative work of the Government . . . ." *Enever* v. *The King*, 3 Com. L. R. 969, 988 (1906); see also *Davidson* v. *Walker*, 1 N. S. W. St. R. 196, 208–213 (1901), and *Hawley* v. *Steele*, 6 Ch. D. 521 (quoted therein): "'In other words, I think the discretion is vested in the executive Government, having authority over military matters, to determine for which, of these various military purposes for which land may fairly be required, the particular land in question is to be appropriated. It is not for the Judge to say that they have made a bad selection.'" 1 N. S. W. St. R. 211.

[28] "'Employee of the government' includes . . . members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity." 28 U. S. C. § 2671.

acts even though negligently performed and involving an abuse of discretion." [29]

So we know that the draftsmen did not intend it to relieve the Government from liability for such common-law torts as an automobile collision caused by the negligence of an employee, see p. 28, *supra*, of the administering agency. We know it was intended to cover more than the administration of a statute or regulation because it appears disjunctively in the second phrase of the section. The "discretion" protected by the section is not that of the judge—a power to decide within the limits of positive rules of law subject to judicial review. It is the discretion of the executive or the administrator to act according to one's judgment of the best course, a concept of substantial historical ancestry in American law.[30]

This contention is met by petitioners with these arguments:

> "To accept the foregoing close and narrow reasoning [of the Court of Appeals], which is unrealistic, is to say that a program and undertaking and operation, however like it may be to some private corporation or operation such as the manufacture of an explosive, is nevertheless throughout discretionary, if the concept thereof is born in discretion. . . .

[29] Indeed, it has been so held by those district courts which have dismissed complaints charging negligence, following the Government's confession and avoidance plea that the acts alleged to be culpable fell within the exception. *E. g., Boyce* v. *United States*, 93 F. Supp. 866; *Coates* v. *United States*, 181 F. 2d 816; *Denny* v. *United States*, 171 F. 2d 365; *Olson* v. *United States*, 93 F. Supp. 150; *Toledo* v. *United States*, 95 F. Supp. 838; *Thomas* v. *United States*, 81 F. Supp. 881.

[30] It seems sufficient to cite *Marbury* v. *Madison*, 1 Cranch 137, 170; *Spalding* v. *Vilas*, 161 U. S. 483, 498; *Alzua* v. *Johnson*, 231 U. S. 106; *Louisiana* v. *McAdoo*, 234 U. S. 627, 633; *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 131.

> Petitioners assert that in the manufacturing . . . of FGAN, . . . the Government was not charged with any discretionary function or opportunity of discretion, but was charged with the duty of due and reasonable care.
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> "This Court has always applied the theory of discretionary function only to the executive and legislative levels, and has made such function the basis of freedom from interference by the courts a personal one to the particular executive or the legislative branch. Such discretionary function may not be delegated down to subordinates and to others."
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> "The Government's argument, adopted by Judge Rives, is that the responsible Government employees were choosing between alternative courses of action in the steps they took. . . . The argument is that the alleged negligence was in the exercise of 'discretion' simply because it involved a choice.
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> . . . . .
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> "The negligence involved here was far removed from any Cabinet decision to provide aid to Germans and Japanese. . . . It is directed only to the mistakes of judgment and the careless oversight of Government employees who were carrying out a program of manufacturing and shipping fertilizer and who failed to concern themselves as a reasonable man should with the safety of others. . . . Congress delegated to Ordnance no 'discretion' thus to commit wrong."

It is unnecessary to define, apart from this case, precisely where discretion ends. It is enough to hold, as we do, that the "discretionary function or duty" that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or ad-

ministrators in establishing plans, specifications or schedules of operations.[31] Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable. If it were not so, the protection of § 2680 (a) would fail at the time it would be needed, that is, when a subordinate performs or fails to perform a causal step, each action or nonaction being directed by the superior, exercising, perhaps abusing, discretion.[32]

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[31] There are, of course, American state cases which are premised on a similar policy judgment, *e. g., Barrett* v. *State of New York*, 220 N. Y. 423, 116 N. E. 99; *Goldstein* v. *State of New York*, 281 N. Y. 396, 24 N. E. 2d 97. Similarly in England the courts have been wary not to penalize discretionary acts of public bodies. One of the more interesting cases in the field is *East Suffolk Rivers Catchment Board* v. *Kent*, [1941] A. C. 74, involving certain allegedly negligent activities by the Board in draining inundated lands of the private plaintiffs. Lord Romer stated that the Board, under its enabling act, merely had the power to drain; "whether or not they should exercise that power was a matter entirely within their own discretion." "I know of no authority for the proposition that in selecting the time within which, the extent to which, and the method by which its statutory power is to be exercised [the Board] owes any duty whatsoever." *Ibid.*, at 97, 98. See also *Sheppard* v. *Glossop Corporation*, [1921] 3 K. B. 132: "[the statute] leaves it to [the Corporation's] discretion whether they will light the district or any part of it, and how long the lamps shall be kept lit in any portion of the district which they elect to light." See also *Whiting* v. *Middlesex County Council*, [1948] 1 K. B. 162.

[32] The courts that have passed upon the application of § 2680 (a) to suits under the Tort Claims Act have interpreted the exception of discretionary functions, generally, in conformity with our holding that negligence in policies or plans for authorized governmental activities cannot support damage suits.

Plaintiff in *Boyce* v. *United States*, 93 F. Supp. 866, charged that he had suffered damage by virtue of certain governmentally-conducted blasting operations. The United States, by way of affirmative defense, showed that the blasting had been conducted pursuant to detailed plans and specifications drawn by the Chief of Engineers who,

III. That the cabinet-level decision to institute the fertilizer export program was a discretionary act is not seriously disputed. Nor do we think that there is any doubt that the need for further experimentation with FGAN to determine the possibility of its explosion, under

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in turn, had been specifically delegated "discretion of the broadest character" to draft a plan for deepening the Mississippi River channel. The exception was applied. There have been several cases of like import dealing with the execution of waterway projects. In *Coates* v. *United States*, 181 F. 2d 816, damages were sought for injury to crops and land from action of the Government in negligently changing the course of the Missouri. It was held that no jurisdiction existed under the Act. The case was followed in *North* v. *United States*, 94 F. Supp. 824. There the plaintiff was denied recovery for injury to his cellar and cesspool occasioned by a government dam having raised the level of the local ground water. A like result obtained in *Lauterbach* v. *United States*, 95 F. Supp. 479, where claimant sued to recover damages resulting from release of flood waters at Bonneville Dam.

Olson v. *United States*, 93 F. Supp. 150, involved another claim of water damage. In that case, employees of the Fish and Wildlife Service were alleged to have "wilfully and intentionally opened the flood gates" of a certain dam, causing loss of plaintiff's livestock. The dam was operated for "the purpose of storing water for the propagating of fish and wildlife" and the court held that "*when* flood waters are to be released and *how much* water is to be released certainly calls for the exercise of judgment." 93 F. Supp., at 151, 152–153. *Sickman* v. *United States*, 184 F. 2d 616, also invoked § 2680 (a). There plaintiff unsuccessfully sought recovery for crop depredations by wild birds induced to feed on his land by a nearby governmental game preserve.

In *Toledo* v. *United States*, 95 F. Supp. 838, plaintiff's automobile had been damaged by a partially rotten tree falling perchance at a time when he had parked under it. The tree had been planted and grown at a government plant experimental station in Puerto Rico. It was open to the public for instruction and observation. The opinion holds that the operation of the station itself, and the decision to plant and preserve this particular tree to further its experimental purposes, were "peculiarly within the discretion of the appropriate employees of the Station," but that negligent removal would not have been. 95 F. Supp., at 841.

conditions likely to be encountered in shipping, and its combustibility was a matter to be determined by the discretion of those in charge of the production. Obviously, having manufactured and shipped the commodity FGAN for more than three years without even minor accidents, the need for further experimentation was a matter of discretion. Reported instances of heating or bag damage were investigated and experiments, to the extent deemed necessary, were carried on. In dealing with ammonium nitrate in any form, the industry, and of course Ordnance, were well aware that care must be taken. The best indication of the care necessary came from experience in FGAN production. The TVA had produced FGAN since 1943, and their experience, as we have indicated, pp. 18–20, was not only available to Ordnance but was used by them to the most minute detail. It is, we think, just such matters of governmental duties that were excepted from the Act.

We turn, therefore, to the specific acts of negligence charged in the manufacture. Each was in accordance with, and done under, specifications and directions as to how the FGAN was produced at the plants. The basic "Plan" was drafted by the office of the Field Director of Ammunition Plants in June, 1946, prior to beginning production.[33] It was drawn up in the light of prior experience by private enterprise and the TVA. In fact it was, as we have pointed out, based on the latter agency's en-

[33] This Plan "contains a tabulation of the installations involved together with pertinent information on those installations for use both in this part and in connection with Part 400; rates of production; description of production processes; information on inspection and acceptance; and information on shipping and storage. This part does not include requirements for the production facilities, recommendations for the operation of these facilities, and problems and methods involved in their administration, which are covered in succeeding parts."

gineering techniques, and specifically adopted the TVA process description and specifications.[34] This Plan was distributed to the various plants at the inception of the program.

Besides its general condemnation of the manufacture of FGAN, the District Court cited four specific acts of negligence in manufacture.[35] Each of these acts looked upon as negligence was directed by this Plan. Applicable excerpts follow. Bagging temperature was fixed.[36] The type of bagging [37] and the labeling thereof [38] were also established. The PRP coating, too, was included in the specifications.[39] The acts found to have

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[34] "The provisions of this chapter and section 1346 (b) of this title shall not apply to . . . any claim arising from the activities of the Tennessee Valley Authority." 28 U. S. C. § 2680 (*l*).

[35] See Appendix, p. 45, this opinion.

[36] "Water shall be turned off and discharging of kettle commenced when temperature reaches 200° F."

The relevance of the bagging temperature apparently stemmed from certain testimony that large masses of FGAN, if maintained at temperatures of around 300° F., might spontaneously ignite under certain conditions of mass and confinement. The Government proffered extensive evidence, however, that the FGAN shipped to Texas City did not leave the plants at nearly that temperature, and of course there is no evidence as to the temperature at which it was loaded on the ships.

[37] "*Packaging*. Ammonium nitrate for fertilizer shall be packed 100 lbs. per bag. Moisture proof paper or burlap bags, as described below, shall be used. (Specifications as to size may have to be altered to meet the manufacturer's requirement)." Then follow detailed specifications.

[38] Marking: Fertilizer (Ammonium Nitrate) 32.5% Nitrogen.

Notice of contents appeared on the bill of lading, so far as important, as follows: 1,000 Bags, Fertilizing Compounds (manufactured fertilizer) NOIBN, dry in paper bags.

[39] "The PRP mixture is composed of one part paraffin, three parts rosin, and one part petrolatum, thoroughly mixed and melted. This provides a coating which repels moisture and holds the clay in place around each granule."

been negligent were thus performed under the direction of a plan developed at a high level under a direct delegation of plan-making authority from the apex of the Executive Department. The establishment of this Plan, delegated to the Field Director's Office, *supra*, p. 20, clearly required the exercise of expert judgment.

This is to be seen, for instance, in the matter of the coating. The PRP was added in order to insure against water absorption. At stake was no mere matter of taste; ammonium nitrate when wet cakes and is difficult to spread on fields as a fertilizer. So the considerations that dictated the decisions were crucial ones, involving the feasibility of the program itself, balanced against present knowledge of the effect of such a coating and the general custom of similar private industries.

And, assuming that high bagging temperatures in fact obtained as the District Court found, the decision to bag at the temperature fixed was also within the exception. Maximum bagging temperatures were first established under the TVA specifications. That they were the product of an exercise of judgment, requiring consideration of a vast spectrum of factors, including some which touched directly the feasibility of the fertilizer export program, is clear. For instance, it appears several times in the record that the question of bagging temperatures was discussed by the Army plant officials, among others. In January, 1947, the Bureau of Explosives of the Association of American Railroads wrote to Ordnance concerning a boxcar fire of FGAN. The letter suggested a reduction of bagging temperatures. The Field Director of Ammunition Plants consulted the commanding officers on the matter. Those of two of the plants which manufactured the Texas City FGAN replied that loading was effected at about 200°. Both, however, recommended that reduced temperatures would be inadvisable. It would be possible to keep the product in graining kettles for a longer

period or to install cooling equipment. But both methods would result in greatly increased production costs and/or greatly reduced production. This kind of decision is not one which the courts, under the Act, are empowered to cite as "negligence"; especially is this so in the light of the contemporary knowledge of the characteristics of FGAN.[46]

As well, serious judgment was involved in the specification of the bag labels and bills of lading. The importance of this rests on the fact that it is the latest point in time and geography when the Government did anything directly related to the fire, for after bagging the FGAN was of course physically in the hands of various non-governmental agents. So, since there was serious room for speculation that the most direct operative fact causing the immediate fire on the *Grandcamp* arose from errors that the French Council, longshoremen or ship staff committed, it was and is important for the petitioners to emphasize the seriousness of the alleged labeling mistake.

This, too, though, falls within the exception for acts of discretion. The Plan had been prepared in this regard

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[46] Captain Hirsch, commanding one of the three plants which manufactured the Texas City FGAN, wrote to the Field Director's Office requesting "that your office stipulate a maximum temperature at which fertilizer may be loaded in order to eliminate" bag deterioration through heat. In reply, the Office stated that it "has had discussions concerning a loading temperature lower than 200° F. for ammonium nitrate fertilizer, but it is felt that this is a matter of process control and not properly an item to be incorporated into specifications." Hirsch interpreted this as meaning that "this facility should not take any active interest in the condition that the ammonium nitrate fertilizer reaches its destination." In reply from the Field Director's Office, this was labeled a "distortion of our statement concerning the bagging temperature as a matter of process control into indifference to any aspect of acceptability or suitability." The specifications were left unchanged as to bags or bagging temperatures.

by the Transportation Officer of the Director's Office. His decision in the matter was dictated by the ICC regulations. These did not provide for a specific classification for the material other than as fertilizer. Labeling it as anything but "oxidizing material" was not required—indeed was probably forbidden—and even this requirement was waived for bags of less than 200 pounds. To the extent, then, that the Army had a choice in the matter, its decision not to seek to list its FGAN in any other fashion was within the exception. The immunity of a decision as to labeling, in fact, is quite clearly shown by the fact that the ICC's regulations, for instance, could not be attacked by claimants under the Act by virtue of the first phrase of § 2680 (a).

In short, the alleged "negligence" does not subject the Government to liability. The decisions held culpable were all responsibly made at a planning rather than operational level and involved considerations more or less important to the practicability of the Government's fertilizer program.

"There must be knowledge of a danger, not merely possible, but probable," *MacPherson* v. *Buick Motor Co.*, 217 N. Y. 382, 389, 111 N. E. 1050, 1053. Here, nothing so startling was adduced. The entirety of the evidence compels the view that FGAN was a material that former experience showed could be handled safely in the manner it was handled here. Even now no one has suggested that the ignition of FGAN was anything but a complex result of the interacting factors of mass, heat, pressure and composition.

IV. The findings of negligence on the part of the Coast Guard in failing to supervise the storage of the FGAN, and in fighting the fire after it started, were rejected by a majority of the Court of Appeals. 197 F. 2d, at 777, 780, 781. We do not enter into an examination of these

factual findings. We prefer, again, to rest our decision on the Act.

The District Court's holding that the Coast Guard and other agencies were negligent in failing to prevent the fire by regulating storage or loading of the fertilizer in some different fashion is like his specific citations of negligence discussed above. They are classically within the exception. "The power to adopt regulations or by-laws . . . for the preservation of the public health, or to pass ordinances prescribing and regulating the duties of policemen and firemen . . . are generally regarded as discretionary, because, in their nature, they are legislative." *Weightman* v. *Corporation of Washington*, 1 Black 39, 49. The courts have traditionally refused to question the judgments on which they are based. *Zywicki* v. *Jos. R. Foard Co.*, 206 F. 975; *Gutowski* v. *Mayor of Baltimore*, 127 Md. 502, 96 A. 630; *State* v. *General Stevedoring Co.*, 213 F. 51.

As to the alleged failure in fighting the fire, we think this too without the Act. The Act did not create new causes of action where none existed before.

> ". . . the liability assumed by the Government here is that created by 'all the circumstances,' not that which a few of the circumstances might create. We find no parallel liability before, and we think no new one has been created by, this Act. Its effect is to waive immunity from recognized causes of action and was not to visit the Government with novel and unprecedented liabilities." *Feres* v. *United States*, 340 U. S. 135, 142.

It did not change the normal rule that an alleged failure or carelessness of public firemen does not create private actionable rights. Our analysis of the question is determined by what was said in the *Feres* case. See 28 U. S. C. §§ 1346 and 2674. The Act, as was there stated,

limited United States liability to "the same manner and to the same extent as a private individual under like circumstances." 28 U. S. C. § 2674. Here, as there, there is no analogous liability; in fact, if anything is doctrinally sanctified in the law of torts it is the immunity of communities and other public bodies for injuries due to fighting fire. This case, then, is much stronger than *Feres*. We pointed out only one state decision which denied government liability for injuries incident to service to one in the state militia. That cities, by maintaining fire-fighting organizations, assume no liability for personal injuries resulting from their lapses is much more securely entrenched. The Act, since it relates to claims to which there is no analogy in general tort law, did not adopt a different rule. See *Steitz* v. *City of Beacon*, 295 N. Y. 51, 64 N. E. 2d 704. To impose liability for the alleged nonfeasance of the Coast Guard would be like holding the United States liable in tort for failure to impose a quarantine for, let us say, an outbreak of foot-and-mouth disease.

V. Though the findings of specific and general negligence do not support a judgment of government liability, there is yet to be disposed of some slight residue of theory of absolute liability without fault. This is reflected both in the District Court's finding that the FGAN constituted a nuisance, and in the contention of petitioners here. We agree with the six judges of the Court of Appeals, 197 F. 2d 771, 776, 781, 786, that the Act does not extend to such situations, though of course well known in tort law generally. It is to be invoked only on a "negligent or wrongful act or omission" of an employee. Absolute liability, of course, arises irrespective of how the tortfeasor conducts himself; it is imposed automatically when any damages are sustained as a result of the decision to engage in the dangerous activity. The degree of care used in performing the activity is irrelevant to the application of that

doctrine. But the statute requires a negligent act. So it is our judgment that liability does not arise by virtue either of United States ownership of an "inherently dangerous commodity" or property, or of engaging in an "extra-hazardous" activity. *United States* v. *Hull*, 195 F. 2d 64, 67.

Petitioners rely on the word "wrongful" though as showing that something in addition to negligence is covered. This argument, as we have pointed out, does not override the fact that the Act does require some brand of misfeasance or nonfeasance, and so could not extend to liability without fault; in addition, the legislative history of the word indicates clearly that it was not added to the jurisdictional grant with any overtones of the absolute liability theory. Rather, Committee discussion indicates that it had a much narrower inspiration: "trespasses" which might not be considered strictly negligent. Hearings before a Subcommittee of the Senate Committee on the Judiciary on S. 2690, 76th Cong., 3d Sess. 43–44. Had an absolute liability theory been intended to have been injected into the Act, much more suitable models could have been found, see *e. g.*, the Suits in Admiralty Act, 41 Stat. 525, 46 U. S. C. §§ 742–743, in regard to maintenance and cure. Street, Tort Liability of the State: The Federal Tort Claims Act and the Crown Proceedings Act, 47 Mich. L. Rev. 341, 350.

Affirmed.

MR. JUSTICE DOUGLAS and MR. JUSTICE CLARK took no part in the consideration or decision of this case.

APPENDIX TO OPINION OF THE COURT.

The District Court's analysis of the specific aspects of the manufacture was foreshadowed by his theory of the foreseeability of the risk which he set out early in the findings. His first finding of fact contained these words: "This record discloses blunders, mistakes, and

acts of negligence, both of omission and commission, on the part of Defendant, its agents, servants, and employees, in deciding to begin the manufacture of this inherently dangerous Fertilizer." It was his conclusion that, through early experiments, the United States had "learned many facts, but did not pursue such investigation far enough to learn all the facts, ... What facts it did learn, however, were sufficient to give Defendant knowledge and to put Defendant on notice, and if not, then upon inquiry that would if pursued, have led to knowledge and notice that such Fertilizer which it decided to and began to manufacture was an inherently dangerous and hazardous material, a dangerous explosive, and a fire hazard. Such facts learned by Defendant pointed to and showed that such Fertilizer should not be manufactured, in that it was, under certain conditions and circumstances, most dangerous to everyone handling it in any way and to the public. Yet Defendant's servants, agents and employees, in whose hands Defendant had left the matter, negligently went forward in the manufacture, handling, distribution, shipping, etc. of such Fertilizer. . . .

"After the manufacture and/or the shipping, distribution, and handling of Fertilizer had begun, there were experiments, events and incidents of which Defendant knew, or of which Defendant could have known by the use of the diligence of a reasonable prudent person, showing such Fertilizer to be very dangerous, both from the standpoint of fire and explosion. With this knowledge, Defendant should have ceased the manufacture and sale of such Fertilizer, or should have taken steps to insure the safety of persons manufacturing and handling such Fertilizer and the public. . . ."

"Defendant in manufacturing such Fertilizer, and particularly the Fertilizer on the Grandcamp and High Flyer, did so by a Formula made and evolved by Defendant or under its direction. It used as a coating of such Fertilizer, a substance or substances which rendered same highly susceptible to fire or explosion. There were various types of coating, but the coating finally used made the Fertilizer a very dangerous explosive and fire hazard. More than any other one thing, I think this coating made this commodity one of the most dangerous of explosives, ..."

". . . Such Fertilizer was by Defendant, or under it[s] direction, placed or sacked in bags made from paper or other substances which were easily ignited by contact with fire or by spontaneous combustion or spontaneous ignition of the Fertilizer. Such bags also became torn and ragged in shipping and particles of the bags became mixed with

the Fertilizer and rendered same more dangerous and more susceptible to fire and explosion."

". . . Such Fertilizer was placed and packed in bags at high degrees of temperature, which temperature rendered the Fertilizer more susceptible to fire and explosion. Such Fertilizer was so packed that it did not cool, but continued at high temperature while being shipped. This was particularly true of the Fertilizer which exploded on the Steamships Grandcamp and High Flyer. Same was packed in sacks at a high degree of temperature, which temperature continued with only slight reduction, if any, when the Fertilizer was shipped across the nation to Texas City and there loaded onto such Steamships."

"Defendant was negligent in the manner in which it marked and labelled such sacks of Fertilizer, including the Fertilizer on the Grandcamp and High Flyer, in that same was not labelled and marked as a dangerous explosive and fire hazard as required by the Rules and Regulations of the Interstate Commerce Commission. . . .

. . . . . .

". . . It was the duty of Defendant, well knowing as it did the dangerous nature and character of such Fertilizer which Defendant shipped or caused to be shipped to Texas City, to notify and advise all the carriers handling same, including the Steamships Grandcamp and High Flyer, and to notify and advise the City and State Officers at Texas City, of the dangerous nature and character of such Fertilizer, to the end that such carriers and their employees and such officers could, if possible protect themselves and the public against the danger of fires from and explosions of such Fertilizer."

The District Court concluded:

"Clearly such Fertilizer ought never to have been manufactured. From the beginning on down, it was a dangerous commodity and a dangerous nuisance."

MR. JUSTICE JACKSON, joined by MR. JUSTICE BLACK and MR. JUSTICE FRANKFURTER, dissenting.

All day, April 15, 1947, longshoremen loaded bags of ammonium nitrate fertilizer aboard the S. S. *Grandcamp*, docked at Texas City, Texas. Shortly after 8 a. m. next morning, when work resumed, smoke was seen coming from the No. 4 hold and it was discovered that fire had broken out in the fertilizer. The ship's master ordered

the hatch covered and battened down, and steam was introduced into the hold. Local fire-fighting apparatus soon arrived, but the combined efforts to extinguish the fire were unavailing. Less than an hour after smoke was first seen, 880 tons of fertilizer in the No. 4 hold exploded and, in turn, detonated the fertilizer stored in the No. 2 hold. Fire spread to the dock area of Texas City and to the S. S. *High Flyer*, berthed at an adjoining pier and carrying a cargo of sulphur and ammonium nitrate fertilizer. Further efforts to extinguish or even contain the fire failed and, about 11 p. m., tugs unsuccessfully attempted to tow the *High Flyer* out to sea. Shortly after one o'clock on the morning of April 17, the sulphur and fertilizer aboard the *High Flyer* exploded, demolishing both that ship and the S. S. *Wilson B. Keene*, lying alongside. More than 560 persons perished in this holocaust, and some 3,000 were injured. The entire dock area of a thriving port was leveled and property damage ran into millions of dollars.

This was a man-made disaster; it was in no sense an "act of God." The fertilizer had been manufactured in government-owned plants at the Government's order and to its specifications. It was being shipped at its direction as part of its program of foreign aid. The disaster was caused by forces set in motion by the Government, completely controlled or controllable by it. Its causative factors were far beyond the knowledge or control of the victims; they were not only incapable of contributing to it, but could not even take shelter or flight from it.

Over 300 suits were brought against the United States under the Federal Tort Claims Act, alleging that its negligence was responsible for the disaster. After consolidating the suits, the District Court ordered the case of the present petitioners to be tried. The parties to all of the suits, in effect, agreed that the common issue of the

Government's negligence should abide the outcome of this test litigation. The Court of Appeals for the Fifth Circuit reversed the trial court's judgment in favor of petitioners.[1] Supporting that reversal, the Government here urges that (1) a private person would not be liable in these circumstances, and (2) even if a private person were liable, the Government is saved from liability by the statute's exception of discretionary acts.[2]

This is one of those cases that a judge is likely to leave by the same door through which he enters. As we have been told by a master of our craft, "*Some* theory of liability, some philosophy of the end to be served by tightening or enlarging the circle of rights and remedies, is at the root of any decision in novel situations when analogies are equivocal and precedents are silent."[3] So, we begin by avowing a conception of the function of legal liability in cases such as this quite obviously at variance with the approach of the Court.

Congress has defined the tort liability of the Government as analogous to that of a private person. Traditionally, one function of civil liability for negligence is to supply a sanction to enforce the degree of care suitable to the conditions of contemporary society and appropriate to the circumstances of the case. The civil damage action, prosecuted and adjusted by private initiative, neither burdening our overworked criminal processes nor confined by the limits of criminal liability, is one of the law's most effective inducements to the watchfulness and prudence necessary to avoid calamity from hazardous operations in the midst of an unshielded populace.

Until recently, the influence of the Federal Government has been exerted in the field of tort law to tighten liabil-

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[1] *In re Texas City Disaster Litigation*, 197 F. 2d 771.

[2] 28 U. S. C. § 2680.

[3] Cardozo, The Growth of the Law, p. 102. (Emphasis his own.)

ity and liberalize remedies.[4] Congress has even imposed criminal liability without regard to knowledge of danger or intent where potentially dangerous articles are introduced into interstate commerce.[5] But, when the Government is brought into court as a tort defendant, the very proper zeal of its lawyers to win their case and the less commendable zeal of officials involved to conceal or minimize their carelessness militate against this trend. The Government, as a defendant, can exert an unctuous persuasiveness because it can clothe official carelessness with a public interest. Hence, one of the unanticipated consequences of the Tort Claims Act has been to throw the weight of government influence on the side of lax standards of care in the negligence cases which it defends.

It is our fear that the Court's adoption of the Government's view in this case may inaugurate an unfortunate trend toward relaxation of private as well as official responsibility in making, vending or transporting inherently dangerous products. For we are not considering here everyday commodities of commerce or products of nature but a complex compound not only proven by

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[4] See, *e. g.*, the Federal Employers' Liability Act, 45 U. S. C. § 51 *et seq.*, which abolished the defense of assumption of risk and changed contributory negligence from a complete bar to recovery to a factor which mitigated damages; the Jones Act, 46 U. S. C. § 688 *et seq.*, which gave a cause of action against their employers to seamen, under the substantive rules of the F. E. L. A.; the Federal Employees' Compensation Act of 1916, 5 U. S. C. § 751 *et seq.*, in which the Government set up a compensation system for its own employees; the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 901 *et seq.*, which sets up a system of workmen's compensation for the described employees and imposes liability without fault on their employers. In cases arising under the last-named Act, the Government is a party to judicial review of any award, representing the interests of the claimant. See *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U. S. 504.

[5] *Boyce Motor Lines* v. *United States*, 342 U. S. 337.

the event to be highly dangerous, but known from the beginning to lie somewhere within the range of the dangerous. Ammonium nitrate, as the Court points out, had been "long used as a component in explosives." This grade of it was manufactured under an explosives patent, in plants formerly used for the manufacture of ordnance, under general supervision of the Army's Chief of Ordnance, and under the local direction of the Army's Field Director of Ammunition Plants. Advice on detailed operations was sought from such experienced commercial producers of high explosives as the du Ponts and the Atlas and the Hercules powder concerns. There is not the slightest basis for any official belief that this was an innocuous product.

Because of reliance on the reservation of governmental immunity for acts of discretion, the Court avoids direct pronouncement on the duty owing by the Government under these circumstances but does sound overtones and undertones with which we disagree. We who would hold the Government liable here cannot avoid consideration of the basic criteria by which courts determine liability in the conditions of modern life. This is a day of synthetic living, when to an ever-increasing extent our population is dependent upon mass producers for its food and drink, its cures and complexions, its apparel and gadgets. These no longer are natural or simple products but complex ones whose composition and qualities are often secret. Such a dependent society must exact greater care than in more simple days and must require from manufacturers or producers increased integrity and caution as the only protection of its safety and well-being. Purchasers cannot try out drugs to determine whether they kill or cure. Consumers cannot test the youngster's cowboy suit or the wife's sweater to see if they are apt to burst into fatal flames. Carriers, by land or by sea, cannot experiment with the combustibility of

goods in transit. Where experiment or research is necessary to determine the presence or the degree of danger, the product must not be tried out on the public, nor must the public be expected to possess the facilities or the technical knowledge to learn for itself of inherent but latent dangers. The claim that a hazard was not foreseen is not available to one who did not use foresight appropriate to his enterprise.

Forward-looking courts, slowly but steadily, have been adapting the law of negligence to these conditions.[6] The law which by statute determines the Government's liability is that of the place where the negligent act or omission

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[6] Judge Lummus, for the Supreme Judicial Court of Massachusetts, articulated this development in *Carter* v. *Yardley & Co., Ltd.*, 319 Mass. 92, 64 N. E. 2d 693. That opinion contains what is perhaps a more decisive statement of the trend than does the earlier landmark opinion of Judge Cardozo for the New York Court of Appeals, *MacPherson* v. *Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050. The following cases represent examples of the type of claims based on damage from complex manufactured products which come before appellate tribunals in the present day. *Coleman Co.* v. *Gray*, 192 F. 2d 265 (absence of safety device on gasoline vapor pressing iron); *Roettig* v. *Westinghouse Mfg. Co.*, 53 F. Supp. 588 (explosion of heating unit in electric stove); *Escola* v. *Coca Cola Bottling Co. of Fresno*, 24 Cal. 2d 453, 150 P. 2d 436 (defect in Coca Cola bottle); *Gall* v. *Union Ice Co.*, 108 Cal. App. 2d 303, 239 P. 2d 48 (absence of warning label on drum of sulfuric acid which burst); *Lindroth* v. *Walgreen Co.*, 407 Ill. 121, 94 N. E. 2d 847 (defective vaporizer which melted, causing fire which burned plaintiff); *Ebers* v. *General Chemical Co.*, 310 Mich. 261, 17 N. W. 2d 176 (damage from chemical designed to kill peach-tree borers); *Willey* v. *Fyrogas Co.*, 363 Mo. 406, 251 S. W. 2d 635 (defect in automatic cutoff valves on gas heater); *Di Vello* v. *Gardner Machine Co.* (Ohio Com. Pl.), 102 N. E. 2d 289 (disintegrating grinding wheel); *Saena* v. *Zenith Optical Co.*, 135 W. Va. 795, 65 S. E. 2d 205 (exploding glass coffee maker). Recovery was not had in all of these cases, but all of them have emphasized that the manufacturer owes some duty of care to certain classes of people who might be injured by defects in his product.

occurred.[7] This fertilizer was manufactured in Iowa and Nebraska, thence shipped to Texas. Speculation as to where the negligence occurred is unnecessary, since each of these jurisdictions recognizes the general proposition that a manufacturer is liable for defects in his product which could have been avoided by the exercise of due care.[8] Where there are no specific state decisions on the point, federal judges may turn to the general doctrines of accepted tort law, whence state judges derive their governing principles in novel cases. We believe that whatever the source to which we look for the law of this case, if the source is as modern as the case itself, it supports the exaction of a higher degree of care than possibly can be found to have been exercised here.

We believe it is the better view that whoever puts into circulation in commerce a product that is known or even suspected of being potentially inflammable or explosive is under an obligation to know his own product and to ascertain what forces he is turning loose. If, as often will be the case, a dangerous product is also a useful one, he is under a strict duty to follow each step of its distribution with warning of its dangers and with information and directions to keep those dangers at a minimum.

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[7] 28 U. S. C. § 1346.

[8] *McAfee* v. *Travis Gas Corp.*, 137 Tex. 314, 153 S. W. 2d 442; *Texas Drug Co.* v. *Caldwell* (Tex. Civ. App.), writ dismissed, 237 S. W. 968; *Tegler* v. *Farmers Union Gas & Oil Co.*, 124 Neb. 336, 246 N. W. 721. As recently as 1949, Circuit Judge Duffy, in discussing Iowa law which was applicable in a diversity suit in federal court, said that the Supreme Court of Iowa had not yet passed squarely on the question, but was of the opinion that they would follow the weight of authority. *Anderson* v. *Linton*, 178 F. 2d 304. An older Iowa case imposes a duty of care on dealers in potentially dangerous substances, at least as to those in contractual privity, *Ellis* v. *Republic Oil Co.*, 133 Iowa 11, 110 N. W. 20; and even the Government here does not rely on the absence of contractual privity to bar petitioners from recovery.

It is obvious that the Court's only choice is to hold the Government's liability to be nothing or to be very heavy, indeed. But the magnitude of the potential liability is due to the enormity of the disaster and the multitude of its victims. The size of the catastrophe does not excuse liability but, on its face, eloquently pleads that it could not have resulted from any prudently operated government project, and that injury so sudden and sweeping should not lie where it has fallen. It should at least raise immediate doubts whether this is one of those "discretionary" operations Congress sought to immunize from liability. With this statement of our general approach to the liability issue, we turn to its application to this case.

In order to show that even a private person would not be liable, the Government must show that the trial court's findings of fact are clearly erroneous.[9] It points to what it claims are patent errors in the lengthy findings made upon a record of over 30,000 pages in 39 printed volumes and apparently urges upon us a rule of *"error in uno, error in omnibus."* We cannot agree that some or even many errors in a record such as this will impeach all of the findings. We conclude that each individual finding must stand or fall on the basis of the evidence to support it. The trial judge found that the explosions resulted from a fire in the fertilizer which had started by some process akin to spontaneous combustion, and that the Government was negligent in failing to anticipate and take precautions against such an occurrence.

The Government's attack on the purely factual determination by the trial judge seems to us utterly unconvincing. Reputable experts testified to their opinion that the fire could have been caused by spontaneous combustion. The Government's contention that it was

[9] Rule 52 (a), Fed. Rules Civ. Proc.

probably caused by someone smoking about the hold brought forth sharp conflict in the testimony. There was no error in adopting one of two permissible inferences as to the fire's origin. And, in view of the absence of any warning that FGAN was inflammable or explosive, we would think smoking by longshoremen about the job would not be an abnormal phenomenon.

The evidence showed that this type of fertilizer had been manufactured for about four years at the time of the explosion in Texas City. Petitioners' experts testified to their belief that at least a segment of informed scientific opinion at the time regarded ammonium nitrate as potentially dangerous, especially when combined with carbonaceous material as it was in this fertilizer. One witness had been hired by the War Production Board to conduct tests into explosion and fire hazards of this product. The Board terminated these tests at an intermediate stage, against the recommendation of the laboratory and in the face of the suggestion that further research might point up suspected but unverified dangers. In addition, there was a considerable history over a period of years of unexplained fires and explosions involving such ammonium nitrate. The zeal and skill of government counsel to distinguish each of these fires on its facts appears to exceed that of some of the experts on whose testimony they rely. The Government endeavored to impeach the opinions of petitioners' experts, introduced experts of its own, and sought to show that private persons who manufactured similar fertilizer took no more precautions than did the Government.

In this situation, even the simplest government official could anticipate likelihood of close packing in large masses during sea shipment, with aggravation of any attendant dangers. Where the risk involved is an explosion of a cargo-carrying train or ship, perhaps in a congested rail yard or at a dock, the producer is not

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entitled as a matter of law to treat industry practice as a conclusive guide to due care. Otherwise, one free disaster would be permitted as to each new product before the sanction of civil liability was thrown on the side of high standards of safety.

It is unnecessary that each of the many findings of negligence by the trial judge survive the "clearly erroneous" test of appellate review. Without passing on the rest of his findings, we find that those as to the duty of further inquiry and negligence in shipment and failure to warn are sufficient to support the judgment.[10] We construe these latter findings not as meaning that each

[10] The following are excerpts from the findings of the trial judge: "(g) . . . [Defendant] learned many facts, but did not pursue such investigation far enough to learn all the facts, but negligently stopped short of learning all of the facts. What facts it did learn, however, were sufficient to give Defendant knowledge and to put Defendant on notice, and if not, then upon inquiry that would if pursued, have led to knowledge and notice that such Fertilizer which it decided to and began to manufacture was an inherently dangerous and hazardous material, a dangerous explosive, and a fire hazard. . . . (l) Defendant was negligent in the manner in which it prepared such Fertilizer, including the Fertilizer on the Grandcamp and High Flyer, for shipment. Such Fertilizer was by Defendant, or under it [*sic*] direction, placed or sacked in bags made from paper or other substances which were easily ignited by contact with fire or by spontaneous combustion or spontaneous ignition of the Fertilizer. Such bags also became torn and ragged in shipping and particles of the bags became mixed with the Fertilizer and rendered same more dangerous and more susceptible to fire and explosion. Such negligence was the proximate cause of such fires and explosions and the injuries of which Plaintiffs complain. . . . (o) Defendant was negligent in delivering or causing to be delivered such Fertilizer, including the Fertilizer on the Grandcamp and High Flyer, so placed in paper bags to the railroad and other carriers over which it was shipped, without informing such carriers that it was dangerous, inflammatory, and explosive in character, and that it was dangerous to persons handling same and to the public. Such negligence was the proximate cause of such fires and explosions and the injuries of which Plaintiffs complain."

omission in the process of bagging, shipping, and failure to warn, if standing alone, would have imposed liability on the Government, but rather that due care is not consistent with this seriatim resolution of every conflict between safety and expediency in favor of the latter. This Court certainly would hold a private corporation liable in this situation, and the statute imposes the same liability upon the Government unless it can bring itself within the Act's exception, to which we now turn."

The Government insists that each act or omission upon which the charge of negligence is predicated—the decisions as to discontinuing the investigation of hazards, bagging at high temperature, use of paper-bagging material, absence of labeling and warning—involved a conscious weighing of expediency against caution and was therefore within the immunity for discretionary acts provided by the Tort Claims Act. It further argues, by way of showing that by such a construction the reservation would not completely swallow the waiver of immunity, that such discretionary decisions are to be distinguished from those made by a truck driver as to the speed at which he will travel so as to keep the latter within the realm of liability.

We do not predicate liability on any decision taken at "Cabinet level" or on any other high-altitude thinking. Of course, it is not a tort for government to govern, and the decision to aid foreign agriculture by making and delivering fertilizer is no actionable wrong. Nor do we

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[11] 28 U. S. C. § 2680: "The provisions of this chapter and section 1346 (b) of this title shall not apply to—

"(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused. . . ."

find any indication that in these deliberations any decision was made to take a calculated risk of doing what was done, in the way it was done, on the chance that what did happen might not happen. Therefore, we are not deterred by fear that governmental liability in this case would make the discretion of executives and administrators timid and restrained. However, if decisions are being made at Cabinet levels as to the temperature of bagging explosive fertilizers, whether paper is suitable for bagging hot fertilizer, and how the bags should be labeled, perhaps an increased sense of caution and responsibility even at that height would be wholesome. The common sense of this matter is that a policy adopted in the exercise of an immune discretion was carried out carelessly by those in charge of detail. We cannot agree that all the way down the line there is immunity for every balancing of care against cost, of safety against production, of warning against silence.

On the ground that the statutory language is not clear, the Government seeks to support its view by resort to selections from an inconclusive legislative history. We refer in the margin to appropriate excerpts which, in spite of the Court's reliance on them, we believe support our conclusion in this case.[12]

The Government also relies on the body of law developed in the field of municipal liability for torts which deal with discretionary, as opposed to ministerial, acts.

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[12] See n. 21 of the Court's opinion. We believe that this oft-repeated paragraph appearing in the House Reports shows quite plainly that what was meant is that type of discretion which government agencies exercise in regulating private individuals. The majority chooses instead to fix an amorphous, all-inclusive meaning to the word, and then to delimit the exception not by whether an act was discretionary but by who exercised the discretion. The statute itself contains not the vaguest intimation of such a test which leaves actionable only the misconduct of file clerks and truck drivers.

Whatever the substantiality of this dichotomy, the cases which have interpreted it are in hopeless confusion; some have used "discretionary" and "ministerial" interchangeably with "proprietary" and "governmental," while others have rather uncritically borrowed the same terminology from the law of mandamus.[12] But even cases cited by the Government hold that, although the municipality may not be held for its decision to undertake a project, it is liable for negligent execution or upkeep.[14]

We think that the statutory language, the reliable legislative history, and the common-sense basis of the rule regarding municipalities, all point to a useful and proper distinction preserved by the statute other than that urged by the Government. When an official exerts governmental authority in a manner which legally binds one or many, he is acting in a way in which no private person could. Such activities do and are designed to affect, often deleteriously, the affairs of individuals, but courts have long recognized the public policy that such official shall be controlled solely by the statutory or administrative mandate and not by the added threat of private damage suits. For example, the Attorney General will not be liable for false arrest in circumstances where a private person performing the same act would be liable,[15] and such cases could be multiplied.[16] The official's act

[12] See Patterson, Ministerial and Discretionary Official Acts, 20 Mich. L. Rev. 848.

[14] *E. g., Keeley* v. *Portland*, 100 Me. 260, 262, 61 A. 180, 181–182; *Cumberland* v. *Turney*, 177 Md. 297, 311, 9 A. 2d 561, 567; *Gallagher* v. *Tipton*, 133 Mo. App. 557, 113 S. W. 674.

[15] *Gregoire* v. *Biddle*, 177 F. 2d 579.

[16] *Spalding* v. *Vilas*, 161 U. S. 483 (Postmaster General); *Wilkes* v. *Dinsman*, 7 How. 89 (officer of Marine Corps); *Otis* v. *Watkins*, 9 Cranch 339 (Deputy Collector of Customs); *Yaselli* v. *Goff*, 12 F. 2d 396, aff'd 275 U. S. 503 (Special Assistant to the Attorney General). The overwhelming weight of authority in the states is to the same effect. See 42 Am. Jur. § 257.

might inflict just as great an injury and might be just as wrong as that of the private person, but the official is not answerable. The exception clause of the Tort Claims Act protects the public treasury where the common law would protect the purse of the acting public official.

But many acts of government officials deal only with the housekeeping side of federal activities. The Government, as landowner, as manufacturer, as shipper, as warehouseman, as shipowner and operator, is carrying on activities indistinguishable from those performed by private persons. In this area, there is no good reason to stretch the legislative text to immunize the Government or its officers from responsibility for their acts, if done without appropriate care for the safety of others. Many official decisions even in this area may involve a nice balancing of various considerations, but this is the same kind of balancing which citizens do at their peril and we think it is not within the exception of the statute.

The Government's negligence here was not in policy decisions of a regulatory or governmental nature, but involved actions akin to those of a private manufacturer, contractor, or shipper. Reading the discretionary exception as we do, in a way both workable and faithful to legislative intent, we would hold that the Government was liable under these circumstances. Surely a statute so long debated was meant to embrace more than traffic accidents. If not, the ancient and discredited doctrine that "The King can do no wrong" has not been uprooted; it has merely been amended to read, "The King can do only little wrongs."

AUTOMATIC CANTEEN COMPANY OF AMERICA *v.* FEDERAL TRADE COMMISSION.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 89. Argued December 12, 15, 1952.—Decided June 8, 1953.

Section 2 (f) of the Robinson-Patman Act makes it unlawful for anyone engaged in interstate commerce "knowingly to induce or receive a discrimination in price which is prohibited" by the Act, but the Act does not prohibit a price differential which makes only due allowance for cost differences. The Federal Trade Commission issued a complaint charging violation of § 2 (f) by petitioner, a large buyer of candy and confections for resale through automatic vending machines operated in many States. At the hearing, the Commission introduced evidence that petitioner received, and in some instances solicited, prices that petitioner knew were as much as 33% lower than the prices to other buyers. Petitioner's motion to dismiss the complaint on the ground that the Commission had not made a prima facie case was denied; and, on petitioner's failure to introduce evidence, the Commission entered a cease and desist order. *Held:*

1. A buyer does not violate § 2 (f) if the lower prices he induces are either within one of the seller's defenses, such as the cost justification, or not known by him not to be within one of those defenses. Pp. 69–74.

2. Proof that the buyer knew that the price he induced or received was lower than that offered other buyers is not sufficient to shift to the buyer the burden of introducing evidence to show justification. Pp. 74–81.

194 F. 2d 433, reversed.

In a proceeding against petitioner under § 2 (f) of the Robinson-Patman Act, 15 U. S. C. § 13, the Federal Trade Commission entered a cease and desist order. 46 F. T. C. 861. On a petition for review, the Court of Appeals affirmed. 194 F. 2d 433. This Court granted certiorari. 344 U. S. 809. *Reversed and remanded*, p. 82.

Edward F. Howrey argued the cause for petitioner. With him on the brief were *L. A. Gravelle, Emil N. Levin* and *Elmer M. Leesman.*

Robert B. Dawkins argued the cause for respondent. With him on the brief were *Solicitor General Cummings, W. T. Kelley* and *James E. Corkey.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

The Robinson-Patman Act, directed primarily against sellers who discriminate in favor of large buyers, includes a provision under which proceedings may be had against buyers who knowingly induce or receive discriminatory prices. That provision, § 2 (f) of the Act, is here for construction for the first time as a result of a complaint issued by the Federal Trade Commission against petitioner, a large buyer of candy and other confectionary products for resale through 230,000-odd automatic vending machines operated in 33 States and the District of Columbia. Petitioner, incorporated in 1931, has enjoyed rapid growth and has attained, so we are told, a dominant position in the sale of confectionary products through vending machines.

The Commission introduced evidence that petitioner received, and in some instances solicited, prices it knew were as much as 33% lower than prices quoted other purchasers, but the Commission has not attempted to show that the price differentials exceeded any cost savings that sellers may have enjoyed in sales to petitioner. Petitioner moved to dismiss the complaint on the ground that the Commission had not made a prima facie case. This motion was denied; the Commission stated that a prima facie case of violation had been established by proof that the buyer received lower prices on like goods than other buyers, "well knowing that it was being favored over competing purchasers," under circumstances where the

requisite effect on competition had been shown. The question whether the price differentials made more than due allowance for cost differentials did not need to be decided "at this stage of the proceeding." On petitioner's failure to introduce evidence, the Commission made findings that petitioner knew the prices it induced were below list prices and that it induced them without inquiry of the seller, or assurance from the seller, as to cost differentials which might justify the price differentials. The Commission thereupon entered a cease and desist order, 46 F. T. C. 861. On review, the Court of Appeals affirmed,[1] holding that the Commission's prima facie case under § 2 (f) does not require showing absence of a cost justification. 194 F. 2d 433.

Section 2 (f) of the Robinson-Patman Act, roughly the counterpart, as to buyers, of sections of the Act dealing with discrimination by sellers, is a vital prohibition in the enforcement scheme of the Act. In situations where buyers may have difficulty in proving their sellers' costs, § 2 (f) could, if the Commission's view in this case prevails, become a major reliance for simplified enforcement of the Act not only by the Commission but by plaintiffs suing for treble damages. Such enforcement, however, might readily extend beyond the prohibitions of the Act and, in doing so, help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation. We therefore thought it necessary to grant certiorari. 344 U. S. 809.

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[1] The Court also granted enforcement of the order on a cross-petition by the Commission. The Commission concedes the impropriety of this action under our decision in *Federal Trade Commission* v. *Ruberoid Co.*, 343 U. S. 470, rendered after the decision of the Court of Appeals in the case now before us. In view of this concession, we assume that the Court of Appeals, on the remand of this case, will, without further direction, reconsider its order for enforcement.

Enforcement of the Clayton Act's original declaration against price discrimination was so frustrated by inadequacies in the statutory language that Congress in 1936 enacted the sweeping amendments to that Act contained in what is known as the Robinson-Patman Act. 49 Stat. 1526, 15 U. S. C. § 13. Chief among the inadequacies had been express exemption of price discrimination in the sales of different quantities of like goods, an exemption that was interpreted as leaving quantity-discount sellers free to grant discounts to quantity buyers that exceeded any cost savings in selling to such buyers. *Goodyear Tire & Rubber Co.* v. *F. T. C.*, 101 F. 2d 620. In an effort to tighten the restriction against price discrimination inimical to the public interest, Congress enacted two provisions bearing on the issues in this case.[2] It made price discrimination in the sale of like goods unlawful without regard to quantity, although quantity discounts, like other price differentials, could still be jus-

[2] The two prohibitions are as follows:

"SEC. 2. (a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: . . . .

[The other provisos of § 2 (a), not relevant here, concern the grant of authority to the Commission to establish quantity limits, recogni-

tified if they made no more than "due allowance" for cost differences in sales to different buyers. Congress in addition sought to reach the large buyer, capable of exerting pressure on smaller sellers, by making it unlawful "knowingly to induce or receive a discrimination in price which is prohibited by this section."

Since precision of expression is not an outstanding characteristic of the Robinson-Patman Act, exact formulation of the issue before us is necessary to avoid inadvertent pronouncement on statutory language in one context when the same language may require separate consideration in other settings. Familiar but loose language affords too ready a temptation for comprehensive but loose construction. We therefore think it imperative in this case to confine ourselves as much as possible to what is in dispute here.

We are here asked to settle a controversy involving simply the burden of coming forward with evidence under § 2 (f) of the Act. The record, so abundant in its instances of individual transactions that the Commission itself felt bound to animadvert on undue proliferation of the evidence by Government lawyers,[3] may be taken as

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tion of the seller's right to select his customers under certain conditions, and exemption of price changes made in response to changing market conditions.]

. . . . . .

"(f) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."

[3] The Commission recognized the need, common in antitrust litigation, for care on the part of the prosecuting officers not to overburden the record. "The record in this case does not disclose the reason for such a plethora of cumulative evidence as was adduced by Government counsel in the instant matter. Neither harassment of litigants nor the waste of Government funds in needless reiteration through cumulative evidence should be countenanced, nor does it seem that it was necessary to name 14 sellers as typical of a group from

presenting varying degrees of bargaining pressure exerted by a buyer on a seller to obtain prices below those quoted other purchasers. In some instances, so the Commission found, petitioner's method was to "inform prospective suppliers of the prices and terms of sale which would be acceptable to [petitioner] without consideration or inquiry as to whether such supplier could justify such a price on a cost basis or whether it was being offered to other customers of the supplier." 46 F. T. C., at 888. A typical instance of the maximum pressure found by the Commission was a series of negotiations in which representatives of petitioner sought to explain to a prospective supplier the kind of savings he might enjoy in sales to petitioner and might make the basis of a price differential. In such instances, petitioner sometimes gave the supplier estimates of what it considered "representative" percentage savings on various costs such as freight, sales costs, packaging, and returns and allowances.[4]

The Commission made no finding negativing the existence of cost savings or stating that whatever cost sav-

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which respondents had induced or received discriminations in price, and certainly the records of not more than 5 of such sellers would have supplied ample evidence of such discriminations or price differentials." *In re Automatic Canteen Co. of America*, 46 F. T. C. 861, 892. Failure to limit the evidence in some such way to typical transactions would create an especially heavy burden in a proceeding against a buyer under § 2 (f) such as that here, where discriminatory sales were alleged to have been made by about 80 of the buyer's 115 suppliers.

[4] Although the Commission recited such instances, it did not relate them to what the buyer should have known as to costs. It did not find from such instances that the circumstances should have provoked inquiry in the mind of a prudent businessman. In short, we do not have a case in which the Commission in its informed judgment was led to conclude that in the circumstances knowing acceptance or inducement of a preference justified an inference of knowledge as to costs.

ings there were did not at least equal price differentials petitioner may have received. It did not make any findings as to petitioner's knowledge of actual cost savings of particular sellers and found only, as to knowledge, that petitioner knew what the list prices to other buyers were. Petitioner, for its part, filed offers of proof that many sellers would testify that they had never told petitioner that the price differential exceeded cost savings. An offer of proof was in turn made by the Commission as to the testimony of these sellers on cross-examination; such proof would have brought out that petitioner never inquired of its suppliers whether the price differential was in excess of cost savings, never asked for a written statement or affidavit that the price differentials did not exceed such savings, and never inquired whether the seller had made up "any exact cost figures" showing cost savings in serving petitioner.

Petitioner claims that the Commission has not, on this record, made a prima facie case of knowing inducement of prices that "made more 'than due allowance for' " cost differences, while the Commission contends that it has established a prima facie case, justifying entry of a cease and desist order where the buyer fails to introduce evidence. Before proceeding to an examination of the statutory provisions, it is desirable to consider the kind of evidence about which this dispute centers. Petitioner is saying in effect that, under the Commission's view, the burden of introducing evidence as to the seller's cost savings and the buyer's knowledge thereof is put on the buyer; this burden, petitioner insists, is so difficult to meet that it would be unreasonable to construe the language Congress has used as imposing it. If so construed, the statute, petitioner contends, would create a presumption so lacking rational connection with the fact established as to violate due process.

We have been invited to consider in this connection some of the intricacies inherent in the attempt to show costs in a Robinson-Patman Act proceeding. The elusiveness of cost data, which apparently cannot be obtained from ordinary business records, is reflected in proceedings against sellers.[5] Such proceedings make us aware of how difficult these problems are, but this record happily does not require us to examine cost problems in detail. It is sufficient to note that, whenever costs have been in issue, the Commission has not been content with accounting estimates; a study seems to be required, involving perhaps stop-watch studies of time spent by some personnel such as salesmen and truck drivers, numerical counts of invoices or bills and in some instances of the number of items or entries on such records, or other such quantitative measurement of the operation of a business.[6]

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[5] For a collection of relevant authorities and secondary material available on cost showings under the Act, see Note, 65 Harv. L. Rev. 1011. See also Fuchs, The Requirement of Exactness in the Justification of Price and Service Differentials under the Robinson-Patman Act, 30 Tex. L. Rev. 1; Haslett, Price Discriminations and their Justifications under the Robinson-Patman Act of 1936, 46 Mich. L. Rev. 450, 472; Sawyer, Accounting and Statistical Proof in Price Discrimination Cases, 36 Iowa L. Rev. 244. For discussion of specific cost cases under the Act, see Aronson, Defenses under the Robinson-Patman Act, in Business and the Robinson-Patman Law (Werne ed.), 212, 227; Taggart, The Cost Principle in Minimum Price Regulation, 110, 8 Mich. Bus. Studies 151, 260 (1938); Warmack, Cost Accounting Problems Under the Robinson-Patman Act, CCH Robinson-Patman Act Symposium (1947) 105; Comment, 35 Ill. L. Rev. 60.

[6] Federal Trade Commission rulings in some cost cases "demonstrate that expert testimony and other evidence extrinsic to an actual cost analysis will be given little weight by the Commission. The FTC apparently believes that such materials lack the objectivity and relevance of the approved method of analysis." Note, 65 Harv. L. Rev. 1011, 1013-1014. See also Warmack, *supra*, note 5. Compare *In re Minneapolis-Honeywell Regulator Co.*, 44 F. T. C. 351, 394, a case

What kind of proof would be required of a buyer we do not know. The Commission argues that knowledge generally available to the buyer from published data or experience in the trade could be used by petitioner to make a reasonable showing of his sellers' costs. There was no suggestion in the Commission's opinion, however, that it would take a different attitude toward cost showings by a buyer than it has taken with respect to sellers, and "general knowledge of the trade," to use the Commission's phrase, unsupported by factual analysis has as yet been far from acceptable, and indeed has been strongly reproved by Commission accountants, as the basis for cost showings in other proceedings before the Commission.[7]

No doubt the burden placed on petitioner to show his sellers' costs, under present Commission standards, is heavy. Added to the considerable burden that a seller himself may have in demonstrating costs is the fact that the data not only are not in the buyer's hands but are ordinarily obtainable even by the seller only after detailed investigation of the business. A subpoena of the seller's records is not likely to be adequate. It is not a question of obtaining information in the seller's hands.[8] It is a matter of studying the seller's business afresh. Insistence on proof of costs by the buyer might thus have other implications; it would almost inevitably require a degree of cooperation between buyer and seller, as against other buyers, that may offend other antitrust policies, and it might also expose the seller's cost secrets to the prejudice of arm's-length bargaining in the future. Finally, not one but, as here, approximately 80 different sellers' costs may be in issue.

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in which "an extensive cost study" resulting from "sincere and extensive efforts" was in part accepted.

[7] See, *e. g.*, Warmack, *supra*, note 5, at 107, 110.

[8] Cf. Longman, Distribution Cost Analysis, 250, and articles cited *supra*, note 5.

It is against this background that the present dispute arises. The legislative setting indicates congressional recognition of the need to charge buyers with a responsibility for price discrimination comparable, so far as possible, to that placed on sellers. Thus, at the least, we can be confident in reading the words in § 2 (f), "a discrimination in price which is prohibited by this section," as a reference to the substantive prohibitions against discrimination by sellers defined elsewhere in the Act.[9] It is therefore apparent that the discriminatory price that buyers are forbidden by § 2 (f) to induce cannot include price differentials that are not forbidden to sellers in other sections of the Act, and, what is pertinent in this case, a buyer is not precluded from inducing a lower price based on cost differences that would provide the seller with a defense. This reading is, indeed, not seriously disputed by the parties. For we are not dealing simply with a "discrimination in price";[10] the "dis-

[9] See, *e. g.*, 80 Cong. Rec. 6428, 9419; H. R. Rep. No. 2951, 74th Cong., 2d Sess. 8.

[10] Were that the case, it might strictly be argued that the seller's "defenses" are not relevant in a § 2 (f) proceeding and that what is prohibited is the knowing inducement or receipt of a price lower than that accorded competing buyers. Such an interpretation has ambiguous legislative support. Congressman Utterback, in submitting the conference report to the House, stated, ". . . a discrimination is more than a mere difference. Underlying the meaning of the word is the idea that some relationship exists between the parties to the discrimination which entitles them to equal treatment, whereby the difference granted to one casts some burden or disadvantage upon the other." 80 Cong. Rec. 9416. Plainly enough, under this statement, a discrimination in price may mean either a price differential in sales to two competitors, or a price differential in sales to two competitors which, because of an absence of cost or other justification, puts the unfavored competitor at a disadvantage. Compare Haslett, *supra*, note 5, at 453–466, with McAllister, Price Control by Law in the United States, 4 Law & Contemp. Prob. 273, 291. In any event, controversy over the meaning of the isolated phrase "discrimination in price" is beside the point here.

crimination in price" in § 2 (f) must be one "which is prohibited by this section." Even if any price differential were to be comprehended within the term "discrimination in price," § 2 (f), which speaks of prohibited discriminations, cannot be read as declaring out of bounds price differentials within one or more of the "defenses" available to sellers, such as that the price differentials reflect cost differences, fluctuating market conditions, or bona fide attempts to meet competition, as those defenses are set out in the provisos of §§ 2 (a) and 2 (b).

This is not to say, however, that the converse follows, for § 2 (f) does not reach all cases of buyer receipt of a prohibited discrimination in prices. It limits itself to cases of knowing receipt of such prices. The Commission seems to argue, in part, that the substantive violation occurs if the buyer knows only that the prices are lower than those offered other buyers. Such a reading not only distorts the language but would leave the word "knowingly" almost entirely without significance in § 2 (f). A buyer with no knowledge whatsoever of facts indicating the possibility that price differences were not based on cost differences would be liable if in fact they were not. We have seen above that § 2 (f) does not refer to all price differentials. But we do not think that price differentials, even as a matter of uncritical impression, come so often within the prohibited range of price discriminations that the language can in any way be read one way for some purposes and another in relation to the word "knowingly."

The Commission's attempts in this case to limit the word "knowingly" to a more reasonable area of prohibition are not, we think, justified by the language Congress has used. The Commission argues that Congress was attempting to reach buyers who through their own activities obtain a special price and that "knowingly to induce or receive" can be read as charging such buyers

with responsibility for whatever unlawful prices result. But that argument would comprehend any buyer who engages in bargaining over price. If the Commission means buyers who exert undue pressure, the argument might find greater support in the legislative background but less in the language Congress has employed. Such a reading not only ignores the word "receive" but opens up even more entangling difficulties with interpretation of what is undue pressure.[11]

The Commission also urges, from legislative explanation of similar language in § 2 (a), that the word "receive" can in some way be limited to a continued and systematic receipt of lower prices that could fairly charge the recipient with knowledge of illegality.[12] While we need not decide whether systematic receipt of prices in itself

[11] Time and again there was recognition in Congress of a freedom to adopt and pass on to buyers the benefits of more economical processes, see, *e. g.*, H. R. Rep. No. 2287, 74th Cong., 2d Sess. 10, 17; 80 Cong. Rec. 9415, 9417; buyer pressure to obtain the benefits of such savings could certainly not be undue pressure. Cf. Edwards, Maintaining Competition, 161. The Commission's findings do not suggest such a discrepancy in bargaining position between this buyer and his suppliers as to warrant characterizing the buyer as "bludgeoning." The Commission did find that those on whom the greatest "pressure" was exerted were such not inconsiderable candy manufacturers as the Curtiss Candy Co. and W. F. Schrafft & Sons Corp.

[12] See H. R. Rep. No. 2951, 74th Cong., 2d Sess. 5–6, explaining the language in § 2 (a) quoted *supra*, note 2, "or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination," as follows: The purpose of the addition of the word "knowingly" "is to exempt from the meaning of the surrounding clause those who incidentally receive discriminatory prices in the routine course of business without special solicitation, negotiation, or other arrangement for them on the part of the buyer or seller, and who are therefore not justly chargeable with knowledge that they are receiving the benefit of such discrimination." The context in which this explanation was given, as well as the precise language, so differs from § 2 (f) that this interpretation does not present a contradiction between it and our reading of § 2 (f).

could ever be sufficient to give the buyer the requisite knowledge,[13] we think, as the argument itself recognizes, that the inquiry must be into the buyer's knowledge of the illegality.

Not only are the arguments of the Commission unsatisfying, but we think a fairer reading of the language and of what limited legislative elucidation we have points toward a reading of § 2 (f) making it unlawful only to induce or receive prices known to be prohibited discriminations.[14] For § 2 (f) was explained in Congress as a provision under which a seller, by informing the buyer that a proposed discount was unlawful under the Act, could discourage undue pressure from the buyer.[15] Of course, such devices for private enforcement of the Act through fear of prosecution could equally well have been achieved by providing that the buyer would be liable if, through the seller or otherwise, he learned that the price he sought or received was lower than that accorded competitors, but we are unable, in the light of congressional policy as expressed in other antitrust legislation, to read this ambiguous language as putting the buyer at his peril whenever he engages in price bargaining. Such a reading must be rejected in view of

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[13] See pp. 80–81, *post*.

[14] We of course do not, in so reading § 2 (f), purport to pass on the question whether a "discrimination in price" includes the prohibitions in such other sections of the Act as §§ 2 (d) and 2 (e).

[15] Congressman Utterback, in presenting the conference report to the House, spoke quite clearly in terms indicating that the provisions of § 2 (f) contemplated only the buyer who knew that the price was not justified by costs. Section 2 (f) "makes it easier [for the manufacturer] to resist the demand for sacrificial price cuts coming from mass-buyer customers, since it enables him to charge them with knowledge of the illegality of the discount, and equal liability for it, by informing them that it is in excess of any differential which his difference in cost would justify as compared with his other customers." 80 Cong. Rec. 9419.

the effect it might have on that sturdy bargaining between buyer and seller for which scope was presumably left in the areas of our economy not otherwise regulated.[16] Although due consideration is to be accorded to administrative construction where alternative interpretation is fairly open, it is our duty to reconcile such interpretation, except where Congress has told us not to, with the broader antitrust policies that have been laid down by Congress. Even if the Commission has, by virtue of the Robinson-Patman Act, been given some authority to develop policies in conflict with those of the Sherman Act in order to meet the special problems created by price discrimination, we cannot say that the Commission here has adequately made manifest reasons for engendering such a conflict so as to enable us to accept its conclusion. Cf. *Eastern-Central Motor Carriers Assn.* v. *United States*, 321 U. S. 194, 211–212.

We therefore conclude that a buyer is not liable under § 2 (f) if the lower prices he induces are either within one of the seller's defenses such as the cost justification or not known by him not to be within one of those defenses. This conclusion is of course only a necessary preliminary in this case. As we have noted earlier, the precise issue in the case before us is the burden of introducing evidence—a separate issue, though of course related to the substantive prohibition. This issue, involving as it does some of the same considerations, requires us further to consider a balance of convenience in the light of whatever evidentiary rules Congress has laid down for proceedings under the Act. Assuming, as we have found, that there is no substantive violation if the buyer did not know that the prices it induced or received were not cost-justified, we must in this case determine whether proof that

[16] Cf. Adelman, Effective Competition and the Antitrust Laws, 61 Harv. L. Rev. 1289, 1331; Edwards, Maintaining Competition, 161.

the buyer knew that the price was lower is sufficient to shift the burden of introducing evidence to the buyer.

The Commission, in support of its position that it need only show the buyer's knowledge that the prices were lower, employs familiar interpretative tools without adequate regard to their immediate serviceability. It labels a seller's defense, such as the cost justification, as an "exception to the general prohibition" and from this argues that under conventional rules of evidence the Commission need come forward with evidence of violation only of the "general prohibition." This interpretation has foundation in the many commonsensical readings of comparable prohibitions so as to put the burden of showing a justification on the one who claims its benefits. We have said as much even in connection with that part of § 2 (b) of the Robinson-Patman Act which attempts to lay down the rules of evidence under the Act.[17] That section provides, "Upon proof being made . . . that there has been discrimination in price . . . the burden of rebut-

[17] *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37, 44–45. Cf. S. Rep. No. 1502, 74th Cong., 2d Sess. 3. Section 2 (b) in its entirety reads as follows: "(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however*, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor." Throughout this opinion, a reference to § 2 (b) is to the procedural language preceding the proviso; the language of the proviso, which we construed in *Standard Oil Co.* v. *Federal Trade Comm'n*, 340 U. S. 231, is referred to only when we speak of the "proviso of § 2 (b)."

ting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section." The Commission points out that it was under this section that we held in the *Morton Salt* case that the burden of showing a cost justification is on the seller in a § 2 (a) proceeding, and argues that the same burden is on the buyer. It argues that the "prima-facie case thus made" clearly refers back to "proof [of] discrimination in price" and thus, from our decision in *Morton Salt*, that the prima facie case of a prohibited discrimination to which § 2 (b) refers consists only of proof of a difference in prices in the sale of like goods having the requisite effect on competition. Saying that § 2 (f) differs from § 2 (a) "only in containing the express requirement that the buyer shall have 'knowingly' induced or received such price discriminations," the Commission asks us to hold that a prima facie case under § 2 (f) is made out with a showing of the prima facie case of § 2 (a) violation "plus the additional element of having induced or received such discrimination with knowledge of the facts which made it violative of Section 2 (a)."

We need not concern ourselves with the Commission's interpretation of the words "prima-facie case thus made" in § 2 (b) and the resulting conclusion that if § 2 (a) and § 2 (f) are to be read as counterparts, the elements necessary for a prima facie case under § 2 (a) are sufficient for a prima facie showing of the "discrimination in price which is prohibited by this section" in § 2 (f). However that may be, the Commission recognizes that there is an "additional element" resulting from the word "knowingly" in § 2 (f), and, of course, it is that element about which the controversy here centers and to which we must address ourselves. We may, however, note in passing that consistency between § 2 (a) and § 2 (f) both as to what constitutes the prohibited "discrimination in price" and as to the elements of a prima facie showing of the

prohibited "discrimination in price" would not be disturbed by a holding against the Commission in this case, for we are concerned here with the prima facie showing of knowledge, admittedly an independent and separate requirement of § 2 (f) above and beyond that of § 2 (a).

The Commission argues that a prima facie case of knowledge is made out when it is shown that the buyer knew the facts making the price differential violative of § 2 (a). At another point it urges that it must now show only "that the buyer affirmatively contributed to obtaining the discriminatory prices by special solicitation, negotiation or other action taken by him." However the argument is phrased, the Commission is, on this record, insisting that once knowledge of a price differential is shown,[18] the burden of introducing evidence shifts to the buyer. The Commission's main reliance in this argument is § 2 (b), which, as we have stated above, we interpreted in the *Morton Salt* case as putting the burden of coming forward with evidence of a cost justification on the seller, on the one, that is, who claimed the benefits of the justification.

To this it is answered that although § 2 (b) does speak not of the seller but of the "person charged with a violation of this section," other language in § 2 (b) and its proviso seems directed mainly to sellers,[19] that the legislative chronology of the various provisions ultimately resulting in the Robinson-Patman Act indicates that § 2 (b) was drafted with sellers in mind, and that the few cases so far decided have dealt only with sellers.

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[18] In this connection, see *supra*, note 4, and *post*, note 24.

[19] For example, the language of the proviso of § 2 (b) concerning price differentials made to meet competition refers only to "a seller"; further, the authority given the Commission under § 2 (b) when justification is not shown is "to issue an order terminating the discrimination," an order that could not usefully be directed to buyers. But cf. 80 Cong. Rec. 9418.

A confident answer cannot be given; some answer must be given. We think we must read the infelicitous language of § 2 (b) as enacting what we take to be its purpose, that of making it clear that ordinary rules of evidence were to apply in Robinson-Patman Act proceedings.[20] If § 2 (b) is to apply to § 2 (f), although we do not decide that it does because we reach the same result without it, we think it must so be read. Considerations of fairness and convenience operative in other proceedings must, we think, have been controlling in the drafting of § 2 (b), for it would require far clearer language than we have here to reach a contrary result. Cf. *Addison* v. *Holly Hill Co.*, 322 U. S. 607, 617–618. If that is so, however, decisions striking the balance of convenience for Commission proceedings against sellers are beside the point.[21] And we think the fact that the buyer does not have the required information, and for good reason should not be required to obtain it, has controlling importance in striking the balance in this case. This result most nearly accommodates this case to the reasons that have been given by judges and

[20] Congressman Patman, describing the § 2 (b) rule as to the burden of proof, said: "It means exactly the rule of law today. It is a restatement of existing law. So far as I am concerned you can strike it out. It makes no difference. It is the law of this land exactly as it is written there." 80 Cong. Rec. 8231.

[21] It does not aid understanding to suggest that § 2 (f) has the same significance, as to a knowing buyer, as other sections of the Act have as to a knowing seller. A buyer knowing he is receiving a lower price cannot be said to be in the same position as a seller granting a lower price. The language of the statute bars such a construction. Even if the buyer has the "same" burden as the seller, the fact that a seller has the burden to show his costs does not automatically, by virtue of § 2 (f), become a buyer's burden to show the seller's cost. Nor has *Federal Trade Commission* v. *Staley Mfg. Co.*, 324 U. S. 746, 759–760, any helpful relation to the problem of this case, if for no other reason than that that case did not call for a detailed consideration of the procedural portions of § 2 (b).

legislators for the rule of § 2 (b), that is, that the burden of justifying a price differential ought to be on the one who "has at his peculiar command the cost and other record data by which to justify such discriminations." [22] Where, as here, such considerations are inapplicable, we think we must disregard whatever contrary indications may be drawn from a merely literal reading of the language Congress has used. It would not give fair effect to § 2 (b) to say that the burden of coming forward with evidence as to costs [23] and the buyer's knowledge thereof shifts to the buyer as soon as it is shown that the buyer knew the prices differed. Certainly the Commission with its broad power of investigation and subpoena, prior to the filing of a complaint, is on a better footing to obtain this information than the buyer. Indeed, though it is of course not for us to enter the domain of the Commission's discretion in such matters, the Commission may in many instances find it not inconvenient to join the offending seller in the proceedings.

If the requirement of knowledge in § 2 (f) has any significant function, it is to indicate that the buyer whom Congress in the main sought to reach was the one who, knowing full well that there was little likelihood of a defense for the seller, nevertheless proceeded to exert pressure for lower prices. Enforcement of the provisions of § 2 (f) against such a buyer should not be difficult. Proof of a cost justification being what it is, too often no one can ascertain whether a price is cost-justified. But trade ex-

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[22] 80 Cong. Rec. 3599. *Samuel H. Moss, Inc.* v. *Federal Trade Commission*, 148 F. 2d 378, 379; 80 Cong. Rec. 8241.

[23] Our view that § 2 (b) permits consideration of conventional rules of fairness and convenience of course requires application of those rules to the particular evidence in question. Evidence, for example, that the seller's price was made to meet a competing seller's offer to a buyer charged under § 2 (f) might be available to a buyer more readily even than to a seller.

perience in a particular situation can afford a sufficient degree of knowledge to provide a basis for prosecution. By way of example, a buyer who knows that he buys in the same quantities as his competitor and is served by the seller in the same manner or with the same amount of exertion as the other buyer can fairly be charged with notice that a substantial price differential cannot be justified. The Commission need only show, to establish its prima facie case, that the buyer knew that the methods by which he was served and quantities in which he purchased were the same as in the case of his competitor. If the methods or quantities differ, the Commission must only show that such differences could not give rise to sufficient savings in the cost of manufacture, sale or delivery to justify the price differential, and that the buyer, knowing these were the only differences, should have known that they could not give rise to sufficient cost savings. The showing of knowledge, of course, will depend to some extent on the size of the discrepancy between cost differential and price differential, so that the two questions are not isolated. A showing that the cost differences are very small compared with the price differential and could not reasonably have been thought to justify the price difference should be sufficient.

What other circumstances can be shown to indicate knowledge on the buyer's part that the prices cannot be justified we need not now attempt to illustrate; [24] but

[24] We need not in this case consider the weight that can be attached to affirmative statements by the seller to the buyer that a price was or was not cost-justified, since there were no such statements in this case. See *supra*, p. 67. We need not now consider whether in an appropriate case the Commission may find it necessary to subject such statements to careful scrutiny. Thus, for instance, the Commission may consider that a seller stating that a price would be unlawful might in some situations be puffing rather than stating anything which a buyer can rely on or should be charged with. On the other hand, the Commission may in some circumstances

surely it will not be an undue administrative burden to explain why other proof may be sufficient to justify shifting the burden of introducing evidence that the buyer is or is not an unsuspecting recipient of prohibited discriminations. We think, in any event, it is for the Commission to spell out the need for imposition of such a harsh burden of introducing evidence as it appears to have sought in this case. Certainly we should have a more solid basis than an unexplained conclusion before we sanction a rule of evidence that contradicts antitrust policy and the ordinary requirements of fairness. While this Court ought scrupulously to abstain from requiring of the Commission particularization in its findings so exacting as to make this Court in effect a court of review on the facts, it is no less important, since we are charged with the duty of reviewing the correctness of the standards which the Commission applies and the essential fairness of the mode by which it reaches its conclusions, that the Commission do not shelter behind uncritical generalities or such looseness of expression as to make it essentially impossible for us to determine what really lay behind the conclusions which we are to review. Cf. *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 510–511.

Because of our view of the balance of convenience in these circumstances, we do not reach petitioner's claim that the Commission is in effect saying that knowledge of a difference in prices creates a presumption of knowledge that the price was unlawful, a presumption it claims would fall for lack of rational connection under *Tot* v. *United States*, 319 U. S. 463. Cf. Note, E[dmund]

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wish to refuse to accept a buyer's claim that he relied on an affidavit or other assurance from the seller that price differentials were cost-justified; the furnishing of such an assurance might, together with other circumstances, indicate a sufficient absence of arm's-length bargaining to raise serious doubts as to the weight the assurance should be given in support of a buyer's claim.

M. M[organ], 56 Harv. L. Rev. 1324. It has seemed to us unnecessary in this case to speak of presumptions, and we need only call attention to the fact that in this case, as in the *Tot* case, we have dealt only with the burden of introducing evidence and not with the burden of persuasion, as to which different considerations may apply.

The judgment of the Court of Appeals, accordingly, is reversed as to the charges in Count II of the complaint (Count I is not before us), and the case is remanded to that court with instructions to remand it to the Federal Trade Commission for such further action as is open under this opinion.

It is so ordered.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK and MR. JUSTICE REED concur, dissenting.

This decision is a graphic illustration of the way in which a statute can be read with enervating effect.

Section 2 (b) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. § 13 (b), provides that where proof is made that there has been "discrimination in price or services or facilities furnished, the burden of rebutting the prima facie case thus made by showing justification shall be *upon the person charged with a violation of this section,* and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination . . . ." (Italics added.)

Section 2 (f) makes it unlawful *"for any person"* engaged in commerce "knowingly to induce or receive a discrimination in price which is prohibited by this section." (Italics added.)

The words "the person charged" as used in § 2 (b) and the words "any person" used in § 2 (f) plainly include buyers as well as sellers.

The nature of the discrimination condemned is made clear in § 2 (a). It outlaws discrimination "in price between different purchasers of commodities of like grade and quality" where the effect is substantially to prevent or lessen competition or tend to create a monopoly as respects any person "who either grants or knowingly receives the benefit of such discrimination." But it permits price differentials "which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities" in which the commodities are sold or delivered.

In the present case, the Court determines that even though a "buyer knew that the price was lower," such knowledge is insufficient to "shift the burden of introducing evidence to the buyer." But § 2 (b) requires the person shown to have practiced a discrimination to establish a justification. Section 2 (f) was intended to make clear that the same bans and burdens are on a *knowing* buyer obtaining discriminatory prices as we held in *Federal Trade Commission* v. *Staley Mfg. Co.*, 324 U. S. 746, 759–760, approved in *Standard Oil Co.* v. *Federal Trade Commission*, 340 U. S. 231, are on a *knowing* seller who grants them.

The record shows persistent and continuous efforts of this large buyer in wheedling and coercing suppliers into granting it discriminatory prices. The Commission summarized petitioner's activities in far more sedate terms than their bizarre nature justified:

> "Respondent used various methods to induce its suppliers to grant discriminatory prices. One of these was to inform prospective suppliers of the prices and terms of sale which would be acceptable to the respondent without consideration or inquiry as to whether such supplier could justify such a price on a cost basis or whether it was being offered to other

customers of the supplier. At other times the respondent refused to buy unless the price to it was reduced below prices at which the particular supplier sold the same merchandise to others. In other instances respondent sought to explain to the prospective supplier that certain alleged savings would accrue to the supplier in selling to respondent or that certain elements of the supplier's cost could be eliminated, which would, in respondent's opinion, justify a lower price. In carrying out this form of inducement, respondent would advise a supplier or prospective supplier of the price which it considered 'standard price'. In letters written to the Curtiss Candy Company on November 15, 1939, and to W. F. Schrafft & Sons Corporation on February 15, 1937, respondent summarized alleged savings to these companies as follows:

Alleged Savings	Curtiss Co.	Schrafft Corp.
(1) Freight savings of.....	6%	5% to 7%
(2) Sales cost savings of.....	7%	7%
(3) 24-count cartons savings of.....	5%	5%
(4) Return and allowances savings of...	1%	1% to 2%
(5) Free deals and samples savings of...	8%	2% to X%
(6) Shipping containers savings of.....	....	1% to 2%
Total deductions.....	27%	21% to 25%

"Respondent advised these companies that such alleged savings could be made because of the method by which respondent made purchases and because certain services could be eliminated in selling to it."

There is no doubt that the large buyers wield clubs that give them powerful advantages over the small merchants. Often large merchants gain advantages over other sellers of the same merchandise by obtaining price concessions by pressure on their suppliers. The evil was

acknowledged in *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37, 43. The Congress plainly endeavored to curb the buyer in the kind of activities disclosed by this record. As the House Report reveals, the line sought to be drawn was between those who incidentally receive discriminatory prices and those who actively solicit and negotiate them. H. R. Rep. No. 2951, 74th Cong., 2d Sess., pp. 5–6.

The Court disregards this history. The Court's construction not only requires the Commission to show that the price discriminations were not justified; it also makes the Commission prove what lay in the buyer's mind. I would let the acts of the buyer speak for themselves. Where, as here, the buyer undertakes to bludgeon sellers into prices that give him a competitive advantage, there is no unfairness in making him show that the privileges he demanded had cost justifications. This buyer over and again held itself out as a cost expert.* I would hold it to its professions. Since it was the coercive influence, there is no unfairness in making it go forward with evidence to rebut the Commission's prima facie case.

*A reading of the record leaves no doubt that petitioner knew in numerous instances that it was squeezing a price from the seller which was less than the seller's costs.

FEDERAL COMMUNICATIONS COMMISSION *v.* RCA COMMUNICATIONS, INC.

NO. 567. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.*

Argued April 29-30, 1953.—Decided June 8, 1953.

Under the Federal Communications Act of 1934, the Commission authorized a radiotelegraph company, which was then serving 39 overseas points, to open two new circuits, to Portugal and The Netherlands. The authorization was opposed by another company which provided similar service by means of 65 circuits, including circuits to each of those countries. The Commission concluded that duplicate facilities should be authorized because of the "national policy in favor of competition." From this policy, the Commission said, it follows that, where competition is "reasonably feasible," it is in the public interest. *Held:*

1. On the record in this case, the Commission's authorization cannot be sustained. Pp. 87–97.

(a) In reviewing such a decision of the Commission, Congress has charged the courts with the responsibility of determining whether the Commission has fairly exercised its discretion within the bounds expressed by the standard of "public interest" and whether the Commission has been guided by proper considerations in bringing its experience and expert judgment to bear on applications for licenses in the public interest. Pp. 90–91.

(b) Encouragement of competition as such is not the single or controlling reliance for safeguarding the public interest in the field of radiotelegraph communication; and this consideration, standing alone, is not sufficient to justify an authorization to duplicate existing services whenever competition is reasonably feasible. Pp. 89–95.

(c) In granting the authorization in this case, the Commission did not properly discharge its responsibility, because its action was not based on its own judgment as to what was in the public interest but on its unjustified assumption that Congress thought authorizations for the sole purpose of encouraging competition were desirable. Pp. 95–96.

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*Together with No. 568, *Mackay Radio & Telegraph Co., Inc.* v. *RCA Communications, Inc.*, also on certiorari to the same court.

(d) If the Commission, in the exercise of its own judgment, reaches a conclusion that duplicating authorizations are in the public interest wherever competition is reasonably feasible, it need not make specific findings of tangible benefit; but there must be ground for reasonable expectation that competition may have some beneficial effect. Pp. 96–97.

2. The Commission's authorization in this case does not violate § 314 of the Communications Act by reason of the corporate affiliation of the radiotelegraph company with the cable company in question—the Commission having determined, upon adequate findings, that the grant of such authorization would not decrease competition. Pp. 97–98.

91 U. S. App. D. C. 289, 201 F. 2d 694, vacated and remanded.

On review by the Court of Appeals, an order of the Federal Communications Commission was reversed. 91 U. S. App. D. C. 289, 201 F. 2d 694. This Court granted certiorari. 345 U. S. 902. *Judgment vacated and case remanded*, p. 98.

Acting Solicitor General Stern argued the cause for petitioner in No. 567. With him on the brief were *Benedict P. Cottone, J. Roger Wollenberg* and *Asher H. Ende.*

Ralph M. Carson argued the cause for petitioner in No. 568. With him on the brief were *John W. Davis, James A. Kennedy, John F. Gibbons, Burton K. Wheeler* and *Francis W. Phillips.*

John T. Cahill argued the cause for respondent. With him on the brief were *Lawrence J. McKay* and *Howard R. Hawkins.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

The Mackay Radio and Telegraph Co. (Mackay) provides radiotelegraph service between the United States and a number of foreign countries. Over the opposition of RCA Communications, Inc. (RCAC), which provides

similar service by means of a total of 65 circuits including ones to Portugal and The Netherlands, the Federal Communications Commission authorized Mackay, at that time authorized to communicate with 39 overseas points, to open two new circuits, to Portugal and The Netherlands. RCAC claims that duplicate circuits, already authorized for RCAC and Mackay to 11 other points, are not here "in the public interest," in that Mackay has been unable to show any tangible benefit to the public, such as better, cheaper or more comprehensive service, to be derived from the authorization of Mackay's circuits. RCAC also urges, as a second objection to the authorizations, that because of Mackay's corporate affiliation with The Commercial Cable Co. (Commercial), which conducts cable service to these points in competition with another cable carrier, Western Union, as well as with radiotelegraph service, authorization of Mackay would lessen competition between radio and cable service and would weaken the competitive efficiency of Commercial, in violation of § 314 of the Federal Communications Act.

The Commission found that competition, that is, duplication of radiotelegraph facilities, would not impair the ability of the existing radio carrier, RCAC, and cable carriers to render adequate service. More facilities are at present authorized than are necessary to handle the present and expected volume of telegraph traffic under normal operating conditions, but Mackay's proposed service would be adequate and would not require substantial new investment. For such reasons the Commission concluded that competition was "reasonably feasible." In addition, although it did "not appear that Mackay's proposed service to each of the points at issue will result in lower rates or speedier service, or will otherwise be superior to or more comprehensive than the service now available via RCAC," the proposed service would be superior to that now provided by Mackay itself and its affili-

ated cable company, Commercial. Finding that "overall competition for telegraph traffic generally" would be increased, and more effective radiotelegraph competition introduced, the Commission concluded that duplicate facilities should be authorized because of the "national policy in favor of competition." From this policy, the Commission said, it follows that "competition" is in the public interest where competition is "reasonably feasible." The Commission, with two members dissenting, thereupon authorized Mackay's proposed service to Portugal and The Netherlands. — F. C. C. —. RCAC sought review and was successful in the Court of Appeals on its claim that an applicant must demonstrate, as the Commission found that Mackay had failed to do here, that tangible benefit to the public would be derived from the authorization. 91 U. S. App. D. C. 289, 294, 201 F. 2d 694, 699, Prettyman, J., dissenting.

We granted certiorari because this case, the first in which the grant of duplicate radiotelegraph circuits has been challenged in the courts, presents an issue of primary importance in authorization, under the Federal Communications Act of 1934, of international radiotelegraph circuits. 345 U. S. 902.

With the chaotic scramble for domestic air space that developed soon after the First World War, Congress recognized the need for a more orderly development of the air waves than had been achieved under prior legislation.[1] Although the Radio Act of 1912 had forbidden the operation of radio apparatus without a license from the Secretary of Commerce and Labor, judicial

[1] A brief outline of earlier federal regulation of radio and wire communication is given in Administrative Procedure in Government Agencies, Monograph of the Attorney General's Committee on Administrative Procedure, S. Doc. No. 186, 76th Cong., 3d Sess., Part 3, 81–84. Early executive and legislative action regarding the laying of foreign cables is reviewed in 22 Op. Atty. Gen. 13 (1898).

decision left him powerless to prevent licensees from using unassigned frequencies, to restrict their transmitting hours and power, or to deny a license on the ground that a proposed station would necessarily interfere with existing stations.[2] See *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 212. Congress thereupon, in the Radio Act of 1927, created the Federal Radio Commission with wide licensing and regulatory powers over interstate and foreign commerce.

Congress did not purport to transfer its legislative power to the unbounded discretion of the regulatory body. In choosing among applicants, the Commission was to be guided by the "public interest, convenience, or necessity," a criterion we held not to be too indefinite for fair enforcement. *New York Central Securities Corp.* v. *United States*, 287 U. S. 12. The statutory standard no doubt leaves wide discretion and calls for imaginative interpretation. Not a standard that lends itself to application with exactitude, it expresses a policy, born of years of unhappy trial and error, that is "as concrete as the complicated factors for judgment in such a field of delegated authority permit." *Federal Communications Comm'n* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 138.

Congress might have made administrative decision to license not reviewable. Although it is not suggested—or implied by the grant of power to review—that Congress could not have reserved to itself or to the Commission final designation of those who would be permitted to utilize the air waves, precious as they have become with technological advance, it has not done so. On the other hand, the scope of this Court's duty to review administrative determinations under the Federal Communications Act of 1934, 48 Stat. 1064, as amended, 47 U. S. C. § 151 *et seq.*,

[2] See *Hoover* v. *Intercity Radio Co.*, 52 App. D. C. 339, 286 F. 1003; *United States* v. *Zenith Radio Corp.*, 12 F. 2d 614; 35 Op. Atty. Gen. 126

has been carefully defined. Ours is not the duty of reviewing determinations of "fact," in the narrow, colloquial scope of that concept. Congress has charged the courts with the responsibility of saying whether the Commission has fairly exercised its discretion within the vaguish, penumbral bounds expressed by the standard of "public interest." It is our responsibility to say whether the Commission has been guided by proper considerations in bringing the deposit of its experience, the disciplined feel of the expert, to bear on applications for licenses in the public interest.

In this case, the Court of Appeals has ruled that the Commission was guided by a misinterpretation of national policy, in that it thought that the maintenance of competition is in itself a sufficient goal of federal communications policy so as to make it in the public interest to authorize a license merely because competition, *i. e.*, duplication of existing facilities, was "reasonably feasible." RCAC relies on the holding of the Court of Appeals that the Commission must decide, in the circumstances of the application, that competition is not merely feasible but beneficial.

The Commission has not in this case clearly indicated even that its own experience, entirely apart from the tangible demonstration of benefit for which RCAC contends, leads it to conclude that competition is here desirable. It seems to have relied almost entirely on its interpretation of national policy. Since the Commission professed to dispose of the case merely upon its view of a principle which it derived from the statute and did not base its conclusion on matters within its own special competence, it is for us to determine what the governing principle is. Cf. *Federal Radio Comm'n* v. *Nelson Bros. Co.*, 289 U. S. 266, 276.

That there is a national policy favoring competition cannot be maintained today without careful qualification.

It is only in a blunt, undiscriminating sense that we speak of competition as an ultimate good. Certainly, even in those areas of economic activity where the play of private forces has been subjected only to the negative prohibitions of the Sherman Law, this Court has not held that competition is an absolute. See *Chicago Board of Trade* v. *United States*, 246 U. S. 231; cf. Mason, Monopoly in Law and Economics, 47 Yale L. J. 34.

Prohibitory legislation like the Sherman Law, defining the area within which "competition" may have full play, of course loses its effectiveness as the practical limitations increase; as such considerations severely limit the number of separate enterprises that can efficiently, or conveniently, exist, the need for careful qualification of the scope of competition becomes manifest. Surely it cannot be said in these situations that competition is of itself a national policy. To do so would disregard not only those areas of economic activity so long committed to government monopoly as no longer to be thought open to competition, such as the post office, cf., *e. g.*, 17 Stat. 292 (criminal offense to establish unauthorized post office; provision since superseded), and those areas, loosely spoken of as natural monopolies or—more broadly—public utilities, in which active regulation has been found necessary to compensate for the inability of competition to provide adequate regulation. It would most strikingly disregard areas where policy has shifted from one of prohibiting restraints on competition to one of providing relief from the rigors of competition, as has been true of railroads. Compare, *e. g.*, *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290, and *United States* v. *Joint Traffic Assn.*, 171 U. S. 505, with the Transportation Act of 1920, 41 Stat. 456, 480; *Consolidation of Railroads*, 63 I. C. C. 455.

Federal legislation affecting railroads is a familiar but far from unique example of those many areas of economic

activity in which serious inroads have been made on an original policy favoring competition. Indeed, as to the industry before us in this case, there has been serious qualification of competition as the regulating mechanism. The very fact that Congress has seen fit to enter into the comprehensive regulation of communications embodied in the Federal Communications Act of 1934 contradicts the notion that national policy unqualifiedly favors competition in communications. The Act by its terms prohibits competition by those whose entry does not satisfy the "public interest" standard. In this field, the reason for such restriction undoubtedly lies primarily in the limited availability of international communication facilities, recognized in a series of international conventions.[3] Other considerations may also have applied: Congress may have considered the possible inconvenience to the public of duplicate facilities—as would more clearly be the case with telephones—or the possible inadequacy of the demand for international communications to make more than one enterprise economically or socially desirable. Whatever the reasons, they are not for us to weigh; it is for us to recognize that encouragement of competition as such has not been considered the single or controlling reliance for safeguarding the public interest.[4]

Of course, the fact that there is substantial regulation does not preclude the regulatory agency from drawing on competition for complementary or auxiliary support. Satisfactory accommodation of the peculiarities of individual industries to the demands of the public interest necessarily requires in each case a blend of private forces

[3] See Donovan, The Origin and Development of Radio Law, 21–26.

[4] We need not in this case attempt to suggest with any precision where the balance is struck. Certainly the presence of §§ 313 and 314 in the Act, prohibiting certain restrictions on competition, indicates the relevance of some competitive criteria, although it hardly directs the Commission to rely on "competition."

and public intervention. The Commission itself has recognized as much by its changing policy toward authorization of duplicate facilities.[5] But this merely reinforces our conclusion that it is improper for the Commission to suppose that the standard it has adopted is to be derived without more from a national policy defined by legislation and by the courts. Had the Commission clearly indicated that it relied on its own evaluation of the needs of the industry rather than on what it deemed a national policy, its order would have a different foundation. There can be no doubt that competition is a relevant factor in weighing the public interest. Cf. *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 86–88. Our difficulty arises from the fact that while the Commission recites that competition may have beneficial effects, it does so in an abstract, sterile way.[6] Its opinion relies in this case

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[5] See Brief for Commission, p. 6: "From 1934 until 1939, when radiotelegraph was just emerging from its infancy, the Commission generally denied applications for circuits to countries already served by other American radiotelegraph carriers. From 1939 to 1942 the Commission generally granted applications for new circuits, regardless of whether the points involved were served by an existing radiotelegraph circuit. From 1942 to 1943 an affirmative policy of authorizing duplicating American circuits (a 'duplicate circuit policy') was followed as a war measure at the behest of the Defense Communications Board. From 1943 until 1945, also as a war measure, the reverse course (a 'single circuit policy') was followed at the behest of the Board of War Communications (the successor of the Defense Communications Board).

"From 1945 until the decision in the present case (1951) the Commission granted a number of duplicating circuits." (Citations and footnotes omitted.)

[6] The Commission stated in its opinion: "Competition can generally be expected to provide a powerful incentive for the rendition of better service at lower cost. Those seeking the patronage of customers are spurred on to install the latest developments in the art in order to improve their services or products, and in order to

not on its independent conclusion, from the impact upon it of the trends and needs of this industry, that competition is desirable but primarily on its reading of national policy, a reading too loose and too much calculated to mislead in the exercise of the discretion entrusted to it.

To say that national policy without more suffices for authorization of a competing carrier wherever competition is reasonably feasible would authorize the Commission to abdicate what would seem to us one of the primary duties imposed on it by Congress. And since we read the opinion of the Commission as saying precisely that, we think the case must be remanded for its reconsideration. We therefore do not say that authorization of Mackay under all the relevant circumstances, including the significance the Commission may rightly attribute to the facts on the basis of its experience, may not be in the public interest.[7]

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enable them to reduce expenses and thereby lower their rates or prices. The benefits to be derived from competition should, therefore, not be lightly discarded." R. 623. Surely one cannot conclude from this bare statement that the Commission, whatever undisclosed awareness it may have of the problem, has sufficiently laid bare its mind to enable us to perform our reviewing function. And it is certainly not for us to say, at least in the first instance, that authorization would be desirable in these circumstances.

[7] We need not stop to consider RCAC's argument that a prior decision of the Commission, the so-called *Oslo* decision, affirmed by the Court of Appeals for the District of Columbia Circuit, stands in the way. *Mackay Radio & Tel. Co.* v. *F. C. C.*, 68 App. D. C. 336, 97 F. 2d 641. Although in that case the facts were similar to those here, the Commission there decided that duplicate facilities should not be authorized. In affirming, the Court of Appeals simply affirmed that competition is not necessarily in the public interest, not that it is never in the public interest. The Court stated: "Appellant contends that the Commission committed error of law in failing to interpret 'public convenience, interest or necessity' as necessarily requiring the licensing of a competing radio circuit to Norway so as to end what appellant describes as the monopoly of RCAC." 68 App. D. C., at 337, 97 F. 2d, at 642. It concluded, "In our opinion,

We think it not inadmissible for the Commission, when it makes manifest that in so doing it is conscientiously exercising the discretion given it by Congress, to reach a conclusion whereby authorizations would be granted wherever competition is reasonably feasible. This is so precisely because the exercise of its functions gives it accumulating insight not vouchsafed to courts dealing episodically with the practical problems involved in such determination. Here, however, the conclusion was not based on the Commission's own judgment but rather on the unjustified assumption that it was Congress' judgment that such authorizations are desirable. Cf. *Texas & Pac. R. Co.* v. *Gulf, C. & S. F. R. Co.*, 270 U. S. 266, 277.

In reaching a conclusion that duplicating authorizations are in the public interest wherever competition is reasonably feasible, the Commission is not required to make specific findings of tangible benefit. It is not required to grant authorizations only if there is a demonstration of facts indicating immediate benefit to the public. To restrict the Commission's action to cases in which tangible evidence appropriate for judicial determination is available would disregard a major reason for the creation of administrative agencies, better equipped as they are for weighing intangibles "by specialization, by insight gained through experience, and by more flexible procedure." *Far East Conf.* v. *United States*, 342 U. S. 570, 575. In the nature of things, the possible benefits of competition do not lend themselves to detailed fore-

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the Commission did not err as matter of law in refusing to treat 'public interest, convenience or necessity' as requiring, by definition, the licensing of appellant." 68 App. D. C., at 339, 97 F. 2d, at 644. We think the precise holding of that case rather supports our conclusion in this case. See Prettyman, J., dissenting below, 91 U. S. App. D. C., at 294, 295, 201 F. 2d, at 699, 700.

cast, cf. *Labor Board* v. *Seven-Up Co.*, 344 U. S. 344, 348, but the Commission must at least warrant, as it were, that competition would serve some beneficial purpose such as maintaining good service and improving it. Although we think RCAC's contention that an applicant must demonstrate tangible benefits is asking too much, it is not too much to ask that there be ground for reasonable expectation that competition may have some beneficial effect. Merely to assume that competition is bound to be of advantage, in an industry so regulated and so largely closed as is this one, is not enough.

RCAC asks us to uphold the Court of Appeals decision on another ground, that the grant of authorization to Mackay would violate § 314 of the Communications Act, which forbids common ownership, control or operation of radio and cable in international communication whose purpose or effect may be substantially to lessen competition, restrain commerce or unlawfully to create a monopoly. We cannot agree. There has been in recent years a considerable shift of international telegraph traffic from cable to radio, a shift strongly accentuated in some countries, including Portugal and The Netherlands, where the overseas correspondent of American companies is a government-controlled monopoly which strongly advocates radio transmission. RCAC, in the two instances before us, is the beneficiary of this discrimination against cable transmission; with negligible exception, it has a monopoly of radio traffic to these countries. In the light of these circumstances, we think the Commission was justified in finding that the grant of Mackay's authorization would increase, rather than decrease, competition. Although it may be true that the relationship of Mackay to Commercial is such that there is, and would be, no competition between them, we think the Commission was entitled to look at the entire competitive scene and not confine itself

to one aspect of it. Mackay and its affiliated cable company had a smaller share of traffic in 1947 than either RCAC or Western Union not only with Portugal and The Netherlands but also with the entire European area. That this authorization would better enable the Mackay system to compete with RCAC and Western Union, and would break up RCAC's monopoly of radio traffic with these countries, seems to us an adequate basis for the Commission's findings under § 314.

RCAC's arguments based on comparable language in the Clayton Act and on decisions under that Act and under the Sherman Law cannot, we think, be sustained. What may substantially lessen competition in those areas where competition is the main reliance for regulation of the market cannot be automatically transplanted to areas in which active regulation is entrusted to an administrative agency; for reasons we have indicated above, what competition is and should be in such areas must be read in the light of the special considerations that have influenced Congress to make specific provision for the particular industry. We therefore think that the Commission's determination that the grant of authorization to Mackay would not decrease competition, in the special sense in which that word is to be used in this context, is supported by the findings and satisfies the requirements of § 314.

For the reasons we have indicated, the judgment of the Court of Appeals is vacated and the case is remanded to that court with instructions to remand it to the Federal Communications Commission for such disposition as is open under this opinion.

It is so ordered.

MR. JUSTICE BLACK is of the opinion that the Commission's findings have substantial evidential support, that the findings adequately support the Commission's

order, that the judgment of the Court of Appeals should be reversed and that the Commission's order should be affirmed.

MR. JUSTICE REED and MR. JUSTICE JACKSON took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS, dissenting.

I agree with the Court that it is necessary under the Federal Communications Act to establish that the licensing of a competitive service offers a reasonable expectation of some beneficial effect, measured by the public interest. That was indeed the view of the Court of Appeals. But on this record the facts are that

—existing facilities are in excess of those required to handle present and expected traffic;

—the proposed operations will redistribute present traffic rather than generate new traffic;

—the proposed service will not lower rates nor speed up transmission nor improve the existing service in any respect;

—the proposed service will aid Mackay financially and be detrimental to RCA;

—this is a field where without the proposed service there is active competition and an excess of facilities to meet present or expected needs.

I therefore agree with Judge Edgerton's opinion for the Court of Appeals (91 U. S. App. D. C. 289, 201 F. 2d 694) that on this showing the Commission acted without authority and that its order should be set aside. On the record before us the facts are so unequivocal that there is no apparent way for the Commission to meet the standard approved both here and below. There is therefore no occasion for a remand. I would affirm the judgment below.

DISTRICT OF COLUMBIA *v.* JOHN R. THOMPSON CO., INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 617. Argued April 30, May 1, 1953.—Decided June 8, 1953.

1. Under Art. I, § 8, cl. 17 of the Federal Constitution, Congress had power to delegate its lawmaking authority to the Legislative Assembly of the municipal corporation created by the Organic Act of 1871 for the government of the District of Columbia. Pp. 104–110.

   (a) The power of Congress under Art. I, § 8, cl. 17 of the Constitution to grant self-government to the District of Columbia is as great as its authority to do so in the case of territories. Pp. 106–107.

   (b) The power of Congress over the District of Columbia relates not only to "national power" but to all the powers of legislation which may be exercised by a state in dealing with its affairs. P. 108.

   (c) The Constitution does not preclude delegation by Congress to the District of Columbia of full legislative power, subject to constitutional limitations to which all lawmaking is subservient and to the power of Congress at any time to revise, alter, or revoke the authority granted. Pp. 108–109.

   (d) In the provision of Art. I, § 8, cl. 17 of the Constitution, empowering Congress "To exercise exclusive Legislation" over the District of Columbia, the word "exclusive" was employed to eliminate any possibility that the legislative power of Congress over the District would be deemed concurrent with that of the ceding states; and it does not make the power nondelegable. Pp. 109–110.

2. Within the meaning of § 18 of the Organic Act of 1871, the "rightful subjects of legislation" to which the legislative power of the District of Columbia government extended was as broad as the police power of a state, and included a law prohibiting discriminations against Negroes by restaurants in the District of Columbia. P. 110.

3. In a criminal proceeding in the District of Columbia, respondent was prosecuted for refusal to serve certain members of the Negro race at one of its restaurants in the District of Columbia solely on account of the race and color of those persons. The information was in four counts, the first charging a violation of the Act

of the Legislative Assembly of the District of Columbia, June 20, 1872, and the others charging violations of the Act of the Legislative Assembly of the District of Columbia, June 26, 1873. Each Act makes it a crime to discriminate against a person on account of race or color or to refuse service to him on that ground. *Held:* The Acts of 1872 and 1873 survived subsequent changes in the government of the District of Columbia and are presently enforceable, except that the Court does not reach the question whether the 1872 Act was repealed by the 1873 Act and leaves that question open on remand of the cause to the Court of Appeals. Pp. 110–118.

(a) The Acts of 1872 and 1873 are not inconsistent with the Acts of Congress of 1874 and 1878, and they survived the latter Acts. Pp. 110–111.

(b) The Acts of 1872 and 1873 were not repealed by the Code of 1901, since, as anti-discrimination laws governing restaurants in the District, they are "police regulations" and acts "relating to municipal affairs" within the meaning of the *Third* exception in § 1636 of the Code. Pp. 112–113.

(c) The Acts of 1872 and 1873 were not abandoned or repealed as a result of non-use and administrative practice. The failure of the executive branch to enforce a law does not result in its modification or repeal. Pp. 113–115.

(d) The Acts of 1872 and 1873 merely *regulate* a licensed business, and (with the possible exception of the provision making mandatory the forfeiture of the license to operate a restaurant) could not be modified, altered, or repealed by the exercise of the *licensing* authority of the Commissioners. Pp. 115–117.

(e) Cases of hardship where criminal laws so long in disuse as to be no longer known to exist are enforced against innocent parties, do not bear on the continuing validity of the law; that is only an ameliorating factor in enforcement. P. 117.

92 U. S. App. D. C. 34, 203 F. 2d 579, reversed.

In a criminal prosecution in the District of Columbia, on an information charging respondent with violations of Acts of 1872 and 1873 of the Legislative Assembly of the District of Columbia, the Court of Appeals held the Acts unenforceable and ordered dismissal of the information. 92 U. S. App. D. C. 34, 203 F. 2d 579. This Court granted certiorari. 345 U. S. 921. *Reversed and remanded*, p. 118.

Chester H. Gray argued the cause for petitioner. With him on the brief were *Vernon E. West* and *Edward A. Beard*.

By special leave of Court, *Philip Elman* argued the cause for the United States, as *amicus curiae*, urging reversal. With him on the brief were *Attorney General Brownell* and *Acting Solicitor General Stern*.

Ringgold Hart argued the cause for respondent. With him on the brief were *John J. Wilson* and *Jo V. Morgan, Jr.*

By special leave of Court, *Edward F. Colladay* argued the cause for the Washington Board of Trade, as *amicus curiae*, in support of respondent. With him on the brief was *D. C. Colladay*.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This is a criminal proceeding prosecuted by information against respondent for refusal to serve certain members of the Negro race at one of its restaurants in the District of Columbia solely on account of the race and color of those persons. The information is in four counts, the first charging a violation of the Act of the Legislative Assembly of the District of Columbia,[1] June 20, 1872,

[1] Section 3 of this Act provides as follows:

"That any restaurant keeper or proprietor, any hotel keeper or proprietor, proprietors or keepers of ice-cream saloons or places where soda-water is kept for sale, or keepers of barber shops and bathing houses, refusing to sell or wait upon any respectable well-behaved person, without regard to race, color, or previous condition of servitude, or any restaurant, hotel, ice-cream saloon or soda fountain, barber shop or bathing-house keepers, or proprietors, who refuse under any pretext to serve any well-behaved, respectable person, in the same room, and at the same prices as other well-behaved and respectable persons are served, shall be deemed guilty of a misdemeanor, and upon conviction in a court having jurisdiction, shall be

and the others charging violations of the Act of the Legislative Assembly of the District of Columbia,[2] June 26, 1873, Dist. Col. Laws 1871–1873, pp. 65, 116. Each Act makes it a crime to discriminate against a person on account of race or color or to refuse service to him on that ground.

The Municipal Court quashed the information on the ground that the 1872 and 1873 Acts had been repealed by implication on the enactment by Congress of the Organic Act of June 11, 1878, 20 Stat. 102. On appeal the Municipal Court of Appeals held that the 1872 and 1873 Acts were valid when enacted, that the former Act, insofar as it applies to restaurants, had been repealed, but that the latter Act was still in effect. It therefore

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fined one hundred dollars, and shall forfeit his or her license as keeper or owner of a restaurant, hotel, ice-cream saloon, or soda fountain, as the case may be, and it shall not be lawful for the Register or any officer of the District of Columbia to issue a license to any person or persons, or to their agent or agents, who shall have forfeited their license under the provisions of this act, until a period of one year shall have elapsed after such forfeiture."

[2] Sections 1 and 2 of the 1873 Act provide for the posting of a schedule of prices by restaurants and other eating or drinking establishments and for the filing of those schedules with the Register of the District. Section 3 provides in part:

"That the proprietor or proprietors, keeper or keepers, of any licensed restaurant, eating-house, bar-room, sample-room, ice-cream saloon, or soda-fountain room shall sell *at* and for *the* usual *or* common prices charged by him, her, or them, as contained in said printed cards or papers, any article or thing kept for sale by him, her, or them to any well-behaved and respectable person or persons who may desire the same, or any part or parts thereof, and serve the same to such person or persons in the same room or rooms in which any other well-behaved person or persons may be served or allowed to eat or drink in said place or establishment." (Italics supplied.)

Section 4 of the Act provides for a fine of $100 and the forfeiture of the license and a prohibition against its reissuance for a period of one year after the forfeiture.

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affirmed the Municipal Court insofar as it dismissed the count based on the 1872 Act and reversed the Municipal Court on the other counts. 81 A. 2d 249. On cross-appeal, the Court of Appeals held that the 1872 and 1873 Acts were unenforceable and that the entire information should be dismissed. 92 U. S. App. D. C. 34, 203 F. 2d 579. The case is here on certiorari. 345 U. S. 921.

I.

The history of congressional legislation dealing with the District of Columbia begins with the Act of July 16, 1790, 1 Stat. 130, by which the District was established as the permanent seat of the Government of the United States. We need not review for the purposes of this case the variety of congressional enactments pertaining to the management of the affairs of the District between that date and 1871. It is with the Organic Act of February 21, 1871, 16 Stat. 419, that we are particularly concerned.

That Act created a government by the name of the District of Columbia, constituted it "a body corporate for municipal purposes" with all of the powers of a municipal corporation "not inconsistent with the Constitution and laws of the United States and the provisions of this act," and gave it jurisdiction over all the territory within the limits of the District. § 1. The Act vested "legislative power and authority" in a Legislative Assembly consisting of a Council and a House of Delegates, members of the Council to be appointed by the President with the advice and consent of the Senate and members of the House of Delegates to be elected by male citizens residing in the District. §§ 5, 7. The Act provided, with exceptions not material here,[3] that "the legislative power of the District

[3] The limitations imposed on the States by Art. I, § 10 of the Constitution were made applicable to the District. § 18. The Legislative Assembly was denied the power to pass designated "special

shall extend to all rightful subjects of legislation within said District, consistent with the Constitution of the United States and the provisions of this act." § 18. All acts of the Legislative Assembly were made subject at all times "to repeal or modification" by Congress. § 18. And it was provided that nothing in the Act should be construed to deprive Congress of "the power of legislation" over the District "in as ample manner as if this law had not been enacted." § 18. Executive power was vested in a governor appointed by the President by and with the advice of the Senate. § 2. And it was provided that the District should have in the House of Representatives an elected delegate having the same rights and privileges as those of delegates from federal territories. § 34.

This government (which was short-lived [4]) was characterized by the Court as a "territorial government." *Eckloff* v. *District of Columbia*, 135 U. S. 240, 241. The analogy is an apt one. The grant to the Legislative Assembly by § 18 of legislative power which extends "to all rightful subjects of legislation" is substantially identical with the grant of legislative power to territorial governments which reads: "The legislative power of every Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States." R. S. § 1851.

The power of Congress over the District and its power over the Territories are phrased in very similar language

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laws" including the granting of divorces, the remission of fines, penalties, or forfeitures, changing the law of descent, creating any bank of circulation, or authorizing the issuance of notes for circulation as money or currency. § 17.

[4] The Temporary Organic Act of June 20, 1874, 18 Stat. 116, substituted a temporary government of three Commissioners appointed by the President. This form of government was placed on a permanent basis by the Organic Act of June 11, 1878, 20 Stat. 102.

An account of the "territorial government" is contained in Proctor, Washington Past and Present—A History (1930), vol. 1, pp. 130-141.

in the Constitution. Article I, § 8, cl. 17 of the Constitution provides that "The Congress shall have Power . . . To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States." Article IV, § 3, cl. 2 of the Constitution grants Congress authority over territories in the following words:

> "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ."

The power of Congress to delegate legislative power to a territory is well settled. *Simms* v. *Simms*, 175 U. S. 162, 168; *Binns* v. *United States*, 194 U. S. 486, 491; *Christianson* v. *King County*, 239 U. S. 356, 365. The power which Congress constitutionally may delegate to a territory (subject of course to "the right of Congress to revise, alter, and revoke," *Hornbuckle* v. *Toombs*, 18 Wall. 648, 655) covers all matters "which, within the limits of a State, are regulated by the laws of the State only." [5] *Simms* v. *Simms*, *supra*, p. 168.

The power of Congress to grant self-government to the District of Columbia under Art. I, § 8, cl. 17 of the Con-

[5] This Court has sustained the validity of territorial statutes dealing with a variety of subjects: *Clinton* v. *Englebrecht*, 13 Wall. 434 (regulation of the methods of obtaining jury panels); *Snow* v. *United States*, 18 Wall. 317 (provision for an attorney general, elected by the territorial legislature, to represent the territory and to prosecute crimes against its laws); *Hornbuckle* v. *Toombs*, 18 Wall. 648 (regulation of civil procedure in the courts); *Maynard* v. *Hill*, 125 U. S. 190 (statute granting divorce); *Cope* v. *Cope*, 137 U. S. 682 (regulation of intestate succession of property); *Atchison, T. & S. F. R. Co.* v. *Sowers*, 213 U. S. 55 (limitation on the right to sue for personal injuries); *Christianson* v. *King County*, 239 U. S. 356 (provision for escheat).

stitution would seem to be as great as its authority to do so in the case of territories. But a majority of the judges of the Court of Appeals held that Congress had the constitutional authority to delegate "municipal" but not "general" legislative powers and that the Acts of 1872 and 1873, being in the nature of civil rights legislation, fell in the latter group and were for Congress alone to enact. In reaching that conclusion the Court of Appeals relied upon two decisions of the Court, *Stoutenburgh* v. *Hennick*, 129 U. S. 141, and *Metropolitan R. Co.* v. *District of Columbia*, 132 U. S. 1. The first of these cases involved an act of the Legislative Assembly of the District imposing a license tax on businesses within the District. The Court held, following *Robbins* v. *Shelby County*, 120 U. S. 489, that it could not be constitutionally applied to a representative of a Maryland company soliciting orders in the District of Columbia. The result would have been the same, as the *Robbins* case indicates, had a state rather than the District enacted such a law. So, while it is true that the Court spoke of the authority of Congress to delegate to the District the power to prescribe "local regulation" but not "general legislation," those words in the setting of the case suggest no more than the difference between local matters on the one hand and national matters, such as interstate commerce, on the other.

The second of these cases, *Metropolitan R. Co.* v. *District of Columbia*, 132 U. S. 1, presented the question of the capacity of the District of Columbia to sue. The Court held that it might do so, noting that while the District was "a separate political community," its sovereign power was lodged in the Congress. "The subordinate legislative powers of a municipal character which have been or may be lodged in the city corporations, or in the District corporation, do not make those bodies sovereign. Crimes committed in the Dis-

trict are not crimes against the District, but against the United States. Therefore, whilst the District may, in a sense, be called a State, it is such in a very qualified sense." P. 9. But there is no suggestion in that case that Congress lacks the authority under the Constitution to delegate the powers of home rule to the District.

The power of Congress over the District of Columbia relates not only to "national power" but to "all the powers of legislation which may be exercised by a state in dealing with its affairs." *Atlantic Cleaners & Dyers* v. *United States*, 286 U. S. 427, 435. And see *Stoutenburgh* v. *Hennick*, *supra*, p. 147. There is no reason why a state, if it so chooses, may not fashion its basic law so as to grant home rule or self-government to its municipal corporations. The Court in *Barnes* v. *District of Columbia*, 91 U. S. 540, 544, in construing the Organic Act of February 21, 1871, the one with which we are presently concerned, stated:

> "A municipal corporation, in the exercise of all of its duties, including those most strictly local or internal, is but a department of the State. The legislature may give it all the powers such a being is capable of receiving, making it a miniature State within its locality."

This is the theory which underlies the constitutional provisions of some states allowing cities to have home rule.[6] So it is that decision after decision has held that

[6] See Ariz. Const., Art. XIII, § 2; Calif. Const., Art. XI, § 11; Colo. Const., Art. XX, § 6; Mich. Const., Art. VIII, § 21; Minn. Const., Art. IV, § 36; Mo. Const., Art. VI, § 19; Neb. Const., Art. XI, §§ 2–4; New York Const., Art. IX, § 12; Ohio Const., Art. XVIII, § 3; Okla. Const., Art. XVIII, § 3 (a); Ore. Const., Art. XI, § 2; Tex. Const., Art. XI, § 5; Wash. Const., Art. XI, § 10; W. Va. Const., Art. VI, § 39 (a); Wis. Const., Art. XI, § 3. And see Fordham and Asher, Home Rule Powers in Theory and Practice, 9 Ohio St. L. J. 18; McGoldrick, The Law and Practice of Municipal Home Rule (1933).

the delegated power of municipalities is as broad as the police power of the state, except as that power may be restricted by terms of the grant or by the state constitution. See McQuillin, The Law of Municipal Corporations (3d ed. 1949), § 16.02 *et seq.* And certainly so far as the Federal Constitution is concerned there is no doubt that legislation which prohibits discrimination on the basis of race in the use of facilities serving a public function is within the police power of the states. See *Railway Mail Assn.* v. *Corsi*, 326 U. S. 88, 93–94; *Bob-Lo Excursion Co.* v. *Michigan*, 333 U. S. 28, 34. It would seem then that on the analogy of the delegation of powers of self-government and home rule both to municipalities and to territories there is no constitutional barrier to the delegation by Congress to the District of Columbia of full legislative power, subject of course to constitutional limitations to which all lawmaking is subservient and subject also to the power of Congress at any time to revise, alter, or revoke the authority granted.

There is, however, a suggestion that the power of Congress "To exercise exclusive Legislation" granted by Art. I, § 8, cl. 17 of the Constitution is nondelegable because it is "exclusive." But it is clear from the history of the provision that the word "exclusive" was employed to eliminate any possibility that the legislative power of Congress over the District was to be concurrent with that of the ceding states. See The Federalist, No. 43; 3 Elliot's Debates (2d ed. 1876), pp. 432–433; 2 Story, Commentaries on the Constitution of the United States (4th ed. 1873), § 1218. Madison summed up the need for an "exclusive" power in the Congress as follows:

> "Let me remark, if not already remarked, that there must be a cession, by particular states, of the district to Congress, and that the states may settle the terms of the cession. The states may make what stipulation they please in it, and, if they apprehend any

danger, they may refuse it altogether. How could the general government be guarded from the undue influence of particular states, or from insults, without such exclusive power?" Elliot's *op. cit., supra*, p. 433.

We conclude that the Congress had the authority under Art. I, § 8, cl. 17 of the Constitution to delegate its lawmaking authority to the Legislative Assembly of the municipal corporation which was created by the Organic Act of 1871 and that the "rightful subjects of legislation" within the meaning of § 18 of that Act was as broad as the police power of a state so as to include a law prohibiting discriminations against Negroes by the owners and managers of restaurants in the District of Columbia.

II.

The Acts of 1872 and 1873 survived, we think, all subsequent changes in the government of the District of Columbia and remain today a part of the governing body of laws applicable to the District. The Legislative Assembly was abolished by the Act of June 20, 1874, 18 Stat. 116. That Act provided that the District should be governed by a Commission. § 2. The Revised Statutes relating to the District of Columbia, approved June 20, 1874,[7] kept in full force the prior laws and ordinances "not inconsistent with this chapter, and except as modified or repealed by Congress or the legislative assembly of the District." § 91. Those Acts were followed by the present Organic Act of the District of Columbia approved June 11, 1878, 20 Stat. 102, which provides that "all laws now in force relating to the District of Columbia not

[7] Although the compilation of these statutes carries the notation "Approved June 22, 1874," it appears that the President actually approved the bill on June 20, 1874. See House Journal, 43d Congress, First Sess., pp. 1286–1287.

inconsistent with the provisions of this act shall remain in full force and effect." § 1. We find nothing in the 1874 Act nor in the 1878 Act inconsistent with the Acts here in question. And we find no other intervening act which would effect a repeal of them. Nor is there any suggestion in the briefs or oral argument that the Acts of 1872 and 1873, presently litigated, did not survive the Acts of 1874 and 1878. It indeed appears the Acts of 1874 and 1878 precluded the repeal of these anti-discrimination laws except by an Act of Congress. As *Metropolitan R. Co.* v. *District of Columbia, supra,* at p. 7, says, the "legislative powers" of the District ceased with the Organic Act and thereafter municipal government was confined "to mere administration."

The Commissioners by the Joint Resolution of February 26, 1892, 27 Stat. 394, were vested with local legislative power as respects "reasonable and usual police regulations."[8] But there is no suggestion that their power to make local ordinances was ever exercised to supplant these anti-discrimination laws of the Legislative Assembly with new and different ordinances. Rather the argument is that the 1872 and 1873 Acts were repealed by the Code of 1901, 31 Stat. 1189. Section 1636 of that Code provides in part:

> "All acts and parts of acts of the general assembly of the State of Maryland general and permanent in their nature, all like acts and parts of acts of the legislative assembly of the District of Columbia, and

[8] Section 2 of that Act authorized the Commissioners "to make and enforce all such reasonable and usual police regulations . . . as they may deem necessary for the protection of lives, limbs, health, comfort and quiet of all persons and the protection of all property within the District of Columbia."

The earlier Act of January 26, 1887, 24 Stat. 368, had given the Commissioners authority to make and enforce "usual and reasonable police regulations" over specified matters.

all like acts and parts of acts of Congress applying solely to the District of Columbia in force in said District on the day of the passage of this act are hereby repealed, except:

"Third. Acts and parts of acts relating to the organization of the District government, or to its obligations, or the powers or duties of the Commissioners of the District of Columbia, or their subordinates or employees, or to police regulations, and generally all acts and parts of acts relating to municipal affairs only, including those regulating the charges of public-service corporations. . . ."

The Court of Appeals held that these anti-discrimination laws were "general and permanent" legislation within the meaning of § 1636 and repealed by it, not being saved by the exceptions. The Department of Justice presents an elaborate argument, based on the legislative history of the 1901 Code, to the effect that the anti-discrimination laws here involved were not "general and permanent" laws within the meaning of § 1636. But the lines of analysis presented are quite shadowy; and we find it difficult not to agree that the 1872 and 1873 Acts were "general and permanent" as contrasted to statutes which are private, special, or temporary. That is the sense in which we believe the words "general and permanent" were used in the Code. We conclude, however, that they were saved from repeal by the *Third* exception clause quoted above.

It is our view that these anti-discrimination laws governing restaurants in the District are "police regulations" and acts "relating to municipal affairs" within the meaning of the *Third* exception in § 1636. The Court of Appeals in *United States* v. *Cella*, 37 App. D. C. 433, 435, in construing an Act providing that prosecutions for

violations of penal statutes "in the nature of police or municipal regulations" should be in the name of the District, said,

> "A municipal ordinance or police regulation is peculiarly applicable to the inhabitants of a particular place; in other words, it is local in character."

The laws which require equal service to all who eat in restaurants in the District are as local in character as laws regulating public health, schools, streets, and parks. In *Johnson* v. *District of Columbia,* 30 App. D. C. 520, the Court of Appeals held that an Act of the Legislative Assembly prohibiting cruelty to animals was a police regulation saved from repeal by the *Third* exception to § 1636. The court said it was legislation "in the interest of peace and order" and conducive "to the morals and general welfare of the community." P. 522. Regulation of public eating and drinking establishments in the District has been delegated by Congress to the municipal government from the very beginning.[9] In terms of the history of the District of Columbia there is indeed no subject of legislation more firmly identified with local affairs than the regulation of restaurants.

There remains for consideration only whether the Acts of 1872 and 1873 were abandoned or repealed as a result of non-use and administrative practice. There was one view in the Court of Appeals that these laws are presently unenforceable for that reason. We do not agree. The failure of the executive branch to enforce a law does

[9] See Act of May 3, 1802, 2 Stat. 195, 197 (empowering the City of Washington to provide for the licensing and regulation of "retailers of liquors"); the Act of February 24, 1804, 2 Stat. 254, 255 (authorizing the council of the City of Washington "to license and regulate, exclusively, hackney coaches, *ordinary keepers,* retailers and ferries"); the Act of May 15, 1820, 3 Stat. 583, 587 (authorizing the council of the City of Washington to provide "for licensing, taxing, and regulating, auctions, retailers, ordinaries"). (Italics supplied.)

not result in its modification or repeal. See *Louisville & N. R. Co.* v. *United States*, 282 U. S. 740, 759; *United States* v. *Morton Salt Co.*, 338 U. S. 632, 647, 648. The repeal of laws is as much a legislative function as their enactment.[10]

Congress has had the power to repeal the 1872 and 1873 Acts from the dates of their passage by the Legislative Assembly. But as we have seen, it has not done so.

Congress also has had the authority to delegate to a municipal government for the District the power to pass laws which would alter or repeal the Acts of the Legislative Assembly. As we have seen, the Organic Act of the District of Columbia approved June 11, 1878, withdrew legislative powers from the municipal government. In 1892 the Commissioners were given legislative power as respects "reasonable and usual police regulations."[11] That legislative authority could have been employed to repeal the Acts of 1872 and 1873. See *Stevens* v. *Stoutenburgh*, 8 App. D. C. 513. For as we have noted, regulation of restaurants is a matter plainly within the scope of police regulations. But the Commissioners passed no ordinances dealing with the rights of Negroes in the restaurants of the District. It is argued that their power to do so was withdrawn by Congress in the Code of 1901. It is pointed out that the Code of 1901 kept in force the acts,

[10] See *Snowden* v. *Snowden*, 1 Bland (Md.) 550, 556; *Pearson* v. *International Distillery*, 72 Iowa 348, 357, 34 N. W. 1, 5–6.

We are not concerned here with the type of problem presented by *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349, 352, where want of assertion of power was deemed significant in determining whether the power had actually been conferred. In the present case the fact that there have been no attempts over the years to enforce the 1872 and 1873 Acts is irrelevant to the problem of statutory construction, since there is no doubt that those Acts made unlawful the refusal to serve a person in a restaurant in the District of Columbia because he was a Negro.

[11] See note 8, *supra*.

ordinances, and regulations not repealed; [12] and from that the conclusion is drawn that only Congress could thereafter amend or repeal these enactments of the Legislative Assembly.

We find it unnecessary to resolve that question. For even if we assume that after the Code of 1901 the Commissioners had the authority to replace these anti-discrimination laws with other ones, we find no indication that they ever did so. Certainly no ordinance was enacted which purported to repeal or modify those laws or which, by providing a different measure of a restaurant owner's duty, established a standard in conflict with that provided by the Legislative Assembly.

But it is said that the licensing authority of the Commissioners over restaurants has been employed for 75 years without regard to the equal service requirements of the 1872 and 1873 Acts, that no licenses have been forfeited for violations of those Acts, and that the licensing authority of the Commissioners has been employed in effect to repeal or set aside the provisions of those Acts. But those regulations are health, safety, and sanitary measures.[13] They do not purport to be a complete codification of ordinances regulating restaurants. They contain neither a requirement that Negroes be segregated nor that Negroes be treated without discrimination. The

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[12] Section 1636 provided:

"All acts and parts of acts included in the foregoing exceptions, or any of them, shall remain in force except in so far as the same are inconsistent with or are replaced by the provisions of this code."

Moreover, § 1640 provided, "Nothing in the repealing clause of this code contained shall be held to affect the operation or enforcement in the District of Columbia . . . of any municipal ordinance or regulation, except in so far as the same may be inconsistent with, or is replaced by, some provision of this code."

[13] Congress has granted to the Commissioners authority to license certain businesses, including restaurants. D. C. Code (1951) §§ 47–2301, 47–2327. The Commissioners are authorized to promulgate

case therefore appears to us no different than one where the executive department neglects or refuses to enforce a requirement long prescribed by the legislature.

It would be a more troublesome case if the 1872 and 1873 Acts were licensing laws which through the years had been modified and changed under the legislative authority of the Commissioners. But these Acts do not provide any machinery for the granting and revocation of licenses. They are *regulatory* laws prescribing in terms of civil rights the duties of restaurant owners to members of the public. Upon conviction for violating their provisions, penalties are imposed. There is a fine and in addition a forfeiture of license without right of renewal for a year. But these Acts, unlike the sanitary requirements laid upon restaurants,[14] do not prescribe conditions for the issuance of a license. Like the

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regulations governing the issuance and revocation of such licenses. *Id.*, § 47–2345.

The Commissioners in the Police Regulations of the District of Columbia (1944) have provided various regulations of restaurants, *e. g.*, a requirement that a certificate be obtained from the health officer that the "premises are in proper sanitary condition," Art. XVII, § 19; regulation pertaining to garbage disposal, Art. XXI, §§ 2, 3; a requirement that draperies and decorations in restaurants be fireproof, Art. XVII, § 2. The Commissioners on April 1, 1942, promulgated "Regulations Governing the Establishment and Maintenance of Restaurants, Delicatessens and Catering Establishments in the District of Columbia." These regulations, as amended February 23, 1951, impose various sanitation requirements relating to the structures, fixtures, utensils, and personnel employed in restaurants. They provide for revocation of licenses for failure to comply with the regulations and impose a fine of $300 for violations.

Congress has also provided numerous health measures to regulate the sale of food. See D. C. Code (1951) § 33–101 *et seq.*; § 22–3416 *et seq.* Restaurants which sell alcoholic beverages are regulated under D. C. Code (1951) § 25–101 *et seq.*

[14] See note 13, *supra*.

regulation of wages and hours of work, the employment of minors, and the requirement that restaurants have flameproof draperies,[15] these laws merely *regulate* a licensed business. Therefore, the exercise of the *licensing* authority of the Commissioners could not modify, alter, or repeal these laws.[16] Nor can we discover any other legislative force which has removed them from the existing body of law.

Cases of hardship are put where criminal laws so long in disuse as to be no longer known to exist are enforced against innocent parties. But that condition does not bear on the continuing validity of the law; it is only an ameliorating factor in enforcement.

We have said that the Acts of 1872 and 1873 survived the intervening changes in the government of the Dis-

[15] See note 13, *supra*.

[16] The 1872 and 1873 Acts make mandatory the forfeiture of the license to operate a restaurant once a violation has been established. See notes 1 and 2, *supra*. More recent laws, enacted by Congress, state the terms on which licenses of various establishments including restaurants may be granted and revoked. See D. C. Code (1951) §§ 47–2301, 47–2302, 47–2327, 47–2345. Sec. 47–2345 grants the Commissioners authority to revoke a license "when, in their judgment, such is deemed desirable in the interest of public decency or the protection of lives, limbs, health, comfort, and quiet of the citizens of the District of Columbia, or for any other reason they may deem sufficient." Special provisions are also included for the licensing of persons selling alcoholic beverages and for the revocation of those licenses. D. C. Code (1951) §§ 25–111, 25–115, 25–118. Whether the provisions for forfeiture of licenses contained in the 1872 and 1873 Acts have been modified or superseded by the licensing provisions of those laws is a separate and distinct question on which we intimate no opinion. Even if it were held that the basis for revocation of a restaurant owner's license and the procedure by which that revocation is effected are governed by the later laws, it is clear that the new licensing laws leave unaffected the mandate against discrimination on racial grounds and the provision for a fine of $100 contained in the 1872 and 1873 Acts.

trict of Columbia and are presently enforceable. We would speak more accurately if we said that the 1873 Act survived. For there is a subsidiary question, which we do not reach and which will be open on remand of the cause to the Court of Appeals, whether the 1872 Act under which the first count of the information is laid was repealed by the 1873 Act. On that we express no opinion.

Reversed.

MR. JUSTICE JACKSON took no part in the consideration or decision of this case.

Syllabus.

SECURITIES & EXCHANGE COMMISSION v. RALSTON PURINA CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 512. Argued April 28, 1953.—Decided June 8, 1953.

Without complying with the registration requirements of the Securities Act of 1933, a corporation offered shares of its stock to a number of its "key employees." These employees were not shown to have had access to the kind of information which registration under the Act would disclose. *Held:* These transactions were not exempted under § 4 (1) of the Act as transactions "not involving any public offering." Pp. 120–127.

(a) A transaction "not involving any public offering," within the meaning of § 4 (1), is one with persons who do not need the protection of the Act. Pp. 124–125.

(b) The number of offerees involved is not determinative of whether an offering is "public" within the meaning of § 4 (1). P. 125.

(c) The § 4 (1) exemption does not deprive corporate employees, as a class, of the safeguards of the Act. Pp. 125–126.

(d) In view of the broadly remedial purposes of the Act, it is reasonable to place on an issuer who pleads the § 4 (1) exemption the burden of proving that the purchasers had access to the kind of information which registration under the Act would disclose. Pp. 126–127.

200 F. 2d 85, reversed.

On a complaint brought by the Securities and Exchange Commission under § 20 (b) of the Securities Act of 1933, seeking to enjoin respondent's unregistered offerings of its stock to its employees, the District Court held the exemption of § 4 (1) applicable and dismissed the suit. 102 F. Supp. 964. The Court of Appeals affirmed. 200 F. 2d 85. This Court granted certiorari. 345 U. S. 903. *Reversed*, p. 127.

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Roger S. Foster argued the cause for petitioner. With him on the brief were *Acting Solicitor General Stern, John F. Davis* and *David Ferber.*

Thomas S. McPheeters argued the cause and filed a brief for respondent.

MR. JUSTICE CLARK delivered the opinion of the Court.

Section 4 (1) of the Securities Act of 1933 exempts "transactions by an issuer not involving any public offering" [1] from the registration requirements of § 5.[2] We must decide whether Ralston Purina's offerings of treasury stock to its "key employees" are within this exemption. On a complaint brought by the Commission under § 20 (b) of the Act seeking to enjoin respondent's unregistered offerings, the District Court held the exemption applicable and dismissed the suit.[3] The Court of Appeals affirmed.[4] The question has arisen many times since the Act was passed; an apparent need to define the scope of the private offering exemption prompted certiorari. 345 U. S. 903.

Ralston Purina manufactures and distributes various feed and cereal products. Its processing and distribution

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[1] 48 Stat. 77, as amended, 48 Stat. 906, 15 U. S. C. § 77d.

[2] "SEC. 5. (a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

"(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell or offer to buy such security through the use or medium of any prospectus or otherwise; or

"(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale . . ." 48 Stat. 77, 15 U. S. C. § 77e.

[3] 102 F. Supp. 964 (D. C. E. D. Mo. 1952).

[4] 200 F. 2d 85 (C. A. 8th Cir. 1952).

facilities are scattered throughout the United States and Canada, staffed by some 7,000 employees. At least since 1911 the company has had a policy of encouraging stock ownership among its employees; more particularly, since 1942 it has made authorized but unissued common shares available to some of them. Between 1947 and 1951, the period covered by the record in this case, Ralston Purina sold nearly $2,000,000 of stock to employees without registration and in so doing made use of the mails.

In each of these years, a corporate resolution authorized the sale of common stock "to employees . . . who shall, without any solicitation by the Company or its officers or employees, inquire of any of them as to how to purchase common stock of Ralston Purina Company." A memorandum sent to branch and store managers after the resolution was adopted advised that "The only employees to whom this stock will be available will be those who take the initiative and are interested in buying stock at present market prices." Among those responding to these offers were employees with the duties of artist, bakeshop foreman, chow loading foreman, clerical assistant, copywriter, electrician, stock clerk, mill office clerk, order credit trainee, production trainee, stenographer, and veterinarian. The buyers lived in over fifty widely separated communities scattered from Garland, Texas, to Nashua, New Hampshire, and Visalia, California. The lowest salary bracket of those purchasing was $2,700 in 1949, $2,435 in 1950 and $3,107 in 1951. The record shows that in 1947, 243 employees bought stock, 20 in 1948, 414 in 1949, 411 in 1950, and the 1951 offer, interrupted by this litigation, produced 165 applications to purchase. No records were kept of those to whom the offers were made; the estimated number in 1951 was 500.

The company bottoms its exemption claim on the classification of all offerees as "key employees" in its organization. Its position on trial was that "A key employee . . .

is not confined to an organization chart. It would include an individual who is eligible for promotion, an individual who especially influences others or who advises others, a person whom the employees look to in some special way, an individual, of course, who carries some special responsibility, who is sympathetic to management and who is ambitious and who the management feels is likely to be promoted to a greater responsibility." That an offering to all of its employees would be public is conceded.

The Securities Act nowhere defines the scope of § 4 (1)'s private offering exemption. Nor is the legislative history of much help in staking out its boundaries. The problem was first dealt with in § 4 (1) of the House Bill, H. R. 5480, 73d Cong., 1st Sess., which exempted "transactions by an issuer not with or through an underwriter; . . . ." The bill, as reported by the House Committee, added "and not involving any public offering." H. R. Rep. No. 85, 73d Cong., 1st Sess. 1. This was thought to be one of those transactions "where there is no practical need for [the bill's] application or where the public benefits are too remote." *Id.*, at 5.[5] The exemption as thus delimited became law.[6] It assumed its present shape

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[5] ". . . the bill does not affect transactions beyond the need of public protection in order to prevent recurrences of demonstrated abuses." *Id.*, at 7. In a somewhat different tenor, the report spoke of this as an exemption of "transactions by an issuer unless made by or through an underwriter so as to permit an issuer to make a specific or an isolated sale of its securities to a particular person, but insisting that if a sale of the issuer's securities should be made generally to the public that that transaction shall come within the purview of the Act." *Id.*, at 15, 16.

[6] The only subsequent reference was an oblique one in the statement of the House Managers on the Conference Report: "Sales of stock to stockholders become subject to the act unless the stockholders are so small in number that the sale to them does not constitute a public offering." H. R. Rep. No. 152, 73d Cong., 1st Sess. 25.

with the deletion of "not with or through an underwriter" by § 203 (a) of the Securities Exchange Act of 1934, 48 Stat. 906, a change regarded as the elimination of superfluous language. H. R. Rep. No. 1838, 73d Cong., 2d Sess. 41.

Decisions under comparable exemptions in the English Companies Acts and state "blue sky" laws, the statutory antecedents of federal securities legislation, have made one thing clear—to be public an offer need not be open to the whole world.[7] In *Securities and Exchange Comm'n* v. *Sunbeam Gold Mines Co.*, 95 F. 2d 699 (C. A. 9th Cir. 1938), this point was made in dealing with an offering to the stockholders of two corporations about to be merged. Judge Denman observed that:

> "In its broadest meaning the term 'public' distinguishes the populace at large from groups of individual members of the public segregated because of some common interest or characteristic. Yet such a distinction is inadequate for practical purposes; manifestly, an offering of securities to all red-headed men, to all residents of Chicago or San Francisco, to all existing stockholders of the General Motors Corporation or the American Telephone & Telegraph Company, is no less 'public', in every realistic sense of the word, than an unrestricted offering to the world at large. Such an offering, though not open to everyone who may choose to apply, is none the less 'public'

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[7] *Nash* v. *Lynde*, [1929] A. C. 158; *In re South of England Natural Gas and Petroleum Co., Ltd.*, [1911] 1 Ch. 573; cf. *Sherwell* v. *Combined Incandescent Mantles Syndicate, Ltd.*, 23 T. L. R. 482 (1907). See 80 Sol. J. 785 (1936).

People v. *Montague*, 280 Mich. 610, 274 N. W. 347 (1937); *In re Leach*, 215 Cal. 536, 12 P. 2d 3 (1932); *Mary Pickford Co.* v. *Bayly Bros.*, 68 P. 2d 239 (1937), modified, 12 Cal. 2d 501, 86 P. 2d 102 (1939).

> in character, for the means used to select the particular individuals to whom the offering is to be made bear no sensible relation to the purposes for which the selection is made. . . . To determine the distinction between 'public' and 'private' in any particular context, it is essential to examine the circumstances under which the distinction is sought to be established and to consider the purposes sought to be achieved by such distinction." 95 F. 2d, at 701.

The courts below purported to apply this test. The District Court held, in the language of the *Sunbeam* decision, that "The purpose of the selection bears a 'sensible relation' to the class chosen," finding that "The sole purpose of the 'selection' is to keep part stock ownership of the business within the operating personnel of the business and to spread ownership throughout all departments and activities of the business." [8] The Court of Appeals treated the case as involving "an offering, without solicitation, of common stock to a selected group of key employees of the issuer, most of whom are already stockholders when the offering is made, with the sole purpose of enabling them to secure a proprietary interest in the company or to increase the interest already held by them." [9]

Exemption from the registration requirements of the Securities Act is the question. The design of the statute is to protect investors by promoting full disclosure of information thought necessary to informed investment decisions.[10] The natural way to interpret the private

[8] 102 F. Supp., at 968, 969.

[9] 200 F. 2d, at 91.

[10] *A. C. Frost & Co.* v. *Coeur D'Alene Mines Corp.*, 312 U. S. 38, 40 (1941). The words of the preamble are helpful: "An Act To provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent frauds in the sale thereof, and for other purposes." 48 Stat. 74.

offering exemption is in light of the statutory purpose. Since exempt transactions are those as to which "there is no practical need for [the bill's] application," the applicability of § 4 (1) should turn on whether the particular class of persons affected needs the protection of the Act. An offering to those who are shown to be able to fend for themselves is a transaction "not involving any public offering."

The Commission would have us go one step further and hold that "an offering to a substantial number of the public" is not exempt under § 4 (1). We are advised that "whatever the special circumstances, the Commission has consistently interpreted the exemption as being inapplicable when a large number of offerees is involved." But the statute would seem to apply to a "public offering" whether to few or many.[11] It may well be that offerings to a substantial number of persons would rarely be exempt. Indeed nothing prevents the commission, in enforcing the statute, from using some kind of numerical test in deciding when to investigate particular exemption claims. But there is no warrant for superimposing a quantity limit on private offerings as a matter of statutory interpretation.

The exemption, as we construe it, does not deprive corporate employees, as a class, of the safeguards of the Act. We agree that some employee offerings may come within § 4 (1), *e. g.*, one made to executive personnel who because of their position have access to the same kind of information that the Act would make available in the

[11] See Viscount Sumner's frequently quoted dictum in *Nash* v. *Lynde*: "'The public' . . . is of course a general word. No particular numbers are prescribed. Anything from two to infinity may serve: perhaps even one, if he is intended to be the first of a series of subscribers, but makes further proceedings needless by himself subscribing the whole." [1929] A. C. 158, 169.

form of a registration statement.[12] Absent such a showing of special circumstances, employees are just as much members of the investing "public" as any of their neighbors in the community. Although we do not rely on it, the rejection in 1934 of an amendment which would have specifically exempted employee stock offerings supports this conclusion. The House Managers, commenting on the Conference Report, said that "the participants in employees' stock-investment plans may be in as great need of the protection afforded by availability of information concerning the issuer for which they work as are most other members of the public." H. R. Rep. No. 1838, 73d Cong., 2d Sess. 41.[13]

Keeping in mind the broadly remedial purposes of federal securities legislation, imposition of the burden of proof on an issuer who would plead the exemption seems to us fair and reasonable. *Schlemmer* v. *Buffalo, R. & P. R. Co.*, 205 U. S. 1, 10 (1907). Agreeing, the court below thought the burden met primarily because of the respondent's purpose in singling out its key employees for stock offerings. But once it is seen that the exemption question turns on the knowledge of the offerees, the issuer's motives, laudable though they may be, fade into irrel-

[12] This was one of the factors stressed in an advisory opinion rendered by the Commission's General Counsel in 1935. "I also regard as significant the relationship between the issuer and the offerees. Thus, an offering to the members of a class who should have special knowledge of the issuer is less likely to be a public offering than is an offering to the members of a class of the same size who do not have this advantage. This factor would be particularly important in offerings to employees, where a class of high executive officers would have a special relationship to the issuer which subordinate employees would not enjoy." 11 Fed. Reg. 10952.

[13] A statement entitled to more weight than different views expressed by one of the conferees in Senate debate. See 78 Cong. Rec. 10181, 10182.

evance. The focus of inquiry should be on the need of the offerees for the protections afforded by registration. The employees here were not shown to have access to the kind of information which registration would disclose. The obvious opportunities for pressure and imposition make it advisable that they be entitled to compliance with § 5.

Reversed.

THE CHIEF JUSTICE and MR. JUSTICE BURTON dissent.

MR. JUSTICE JACKSON took no part in the consideration or decision of this case.

NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO. *v.* NOTHNAGLE ET AL.

CERTIORARI TO THE SUPREME COURT OF ERRORS OF CONNECTICUT.

No. 525. Argued April 29, 1953.—Decided June 8, 1953.

A passenger bought from a railroad a ticket for a journey from Meriden, Conn., to Fall River, Mass., via New Haven, Conn. On arriving at New Haven, she alighted to transfer to another train leaving about an hour later. At the station, her suitcase was solicited by a redcap employee of the railroad, to whom she handed it with instructions to return it at the Fall River train. No baggage check was given and no money paid. The suitcase was lost, and the passenger sued in a state court. The railroad company claimed that its liability was limited to $25 by a tariff filed with the Interstate Commerce Commission. The state court rendered judgment for $615, the actual value of the lost baggage. *Held:* Judgment affirmed. Pp. 129–136.

(a) The transaction was incident to an interstate journey, and the Interstate Commerce Act controls, to whatever extent its provisions apply. Pp. 130–131.

(b) The suitcase in question was not "baggage carried on passenger trains" within the meaning of the first exception added in 1916 to the Carmack Amendment, 39 Stat. 442, 49 U. S. C. § 20 (11). Pp. 131–135.

(c) Nor did the tariff filed with the Interstate Commerce Commission control, since there was no "value declared in writing by the shipper or agreed upon in writing," within the meaning of the second exception to the Carmack Amendment. P. 135.

(d) Only by granting its customers a fair opportunity to choose between higher and lower liability by paying a correspondingly greater or lesser charge can a carrier lawfully limit recovery to an amount less than the actual loss sustained. Pp. 135–136.

139 Conn. 278, 93 A. 2d 165, affirmed.

A Connecticut state court awarded respondent a judgment against a railroad for the loss of a suitcase entrusted to a redcap. The State Supreme Court affirmed. 139

Conn. 278, 93 A. 2d 165. This Court granted certiorari. 345 U. S. 903. *Affirmed*, p. 136.

Thomas J. O'Sullivan argued the cause for petitioner. With him on the brief was *Edwin H. Hall.*

John A. Danaher argued the cause and filed a brief for Mrs. George Nothnagle, respondent.

Edward M. Reidy filed a brief for the Interstate Commerce Commission, as *amicus curiae*, urging affirmance.

MR. JUSTICE CLARK delivered the opinion of the Court.

This case concerns the extent of an interstate carrier's liability for a passenger's baggage loss. On October 5, 1949, Mrs. Nothnagle, respondent here, purchased a railway ticket from petitioner in Meriden, Connecticut, for a journey to Fall River, Massachusetts, via New Haven, Connecticut. She boarded a train in Meriden at 11:19 a. m. and arrived shortly after 11:30 a. m. in New Haven where she alighted for transfer to another train. On the station platform her suitcase was solicited by a redcap employee of petitioner, and she handed it to him with orders to return it at the Fall River train departing at 12:40 p. m. No baggage check was given; no money was paid. The suitcase vanished, and respondent sued. At trial in the Meriden City Court the parties stipulated that the baggage and contents actually worth $615 were lost due to petitioner's negligence. Petitioner insisted, however, that its liability as an interstate carrier was governed by a tariff schedule filed with the Interstate Commerce Commission which limited a recovery for baggage loss to $25 unless the passenger had in writing declared a higher valuation.

The state courts granted full recovery to respondent. The trial court found that although respondent had not declared a greater value, she had neither actual knowledge

of petitioner's asserted restriction nor was notified of its existence by a legend on a baggage receipt or posted signs. In any event, the court concluded, petitioner had accepted the baggage only "for safe-keeping and not for transportation," so that the parties' rights were determinable by Connecticut principles of bailments rather than any rule of federal law.[1] The Connecticut Supreme Court of Errors affirmed, viewing respondent's journey from Meriden to Fall River as not "continuous," and "suspended for a substantial time in New Haven" to be resumed only when she boarded the Fall River train.[2] Accordingly, that court deemed the case governed by Connecticut law under which petitioner was held liable for $615.[3] Petitioner claims that this decision impairs federal rights secured by the Interstate Commerce Act, and we granted certiorari to examine the scope of that statutory protection. 345 U. S. 903.

We have little doubt that the transaction was incident to an interstate journey within the ambit of the Interstate Commerce Act. Neither continuity of interstate movement nor isolated segments of the trip can be decisive. "The actual facts govern. For this purpose, the destination intended by the passenger when he begins his journey and known to the carrier, determines the character of the commerce." *Sprout* v. *South Bend*, 277 U. S. 163, 168 (1928). And see *Baltimore & Ohio S. W. R. Co.* v. *Settle*, 260 U. S. 166, 171 (1922); *Galveston, H. & S. A. R. Co.* v. *Woodbury*, 254 U. S. 357 (1920). In this case respondent undertook a journey from Connecticut to Massachusetts, with a temporary stopover for transfer along the way. And it goes unchallenged here that the redcap to whom she entrusted her baggage was a railroad

[1] R. 7–9. The decision of the Meriden City Court is not reported.
[2] 139 Conn. 278, 282, 93 A. 2d 165, 167 (1952).
[3] 139 Conn., at 283, 93 A. 2d, at 167.

employee performing functions, whether viewed as services in connection with an interrupted through trip from Meriden to Fall River or with the second unquestionably interstate leg of respondent's journey, incident to interstate travel and reached by the terms of the Interstate Commerce Act. Cf. *Williams* v. *Jacksonville Terminal Co.*, 315 U. S. 386, 394, 397 (1942); *Stopher* v. *Cincinnati Union Terminal Co.*, 246 I. C. C. 41 (1941).[4] The Interstate Commerce Act, therefore, must control to whatever extent its provisions apply.

With the enactment in 1906 of the Carmack Amendment, Congress superseded diverse state laws with a nationally uniform policy governing interstate carriers' liability for property loss. *E. g., Adams Express Co.* v. *Croninger*, 226 U. S. 491, 504–505 (1913); *Kansas City S. R. Co.* v. *Carl*, 227 U. S. 639, 648–649 (1913). Insofar as now pertinent that enactment provided that any interstate railroad "receiving property for transportation . . . shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it . . . , and no contract, receipt, rule, or regulation shall exempt such . . . railroad . . . from the liability hereby imposed."[5] In 1915 Congress fortified the Carmack Amendment by adding, in part, that "any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void."[6] One year

[4] Neither here nor in *Williams* was the Commission's ruling in the *Stopher* case challenged.

[5] 34 Stat. 595, 49 U. S. C. § 20 (11).

[6] 38 Stat. 1197, 49 U. S. C. § 20 (11). The 1915 amendment was qualified by the following proviso: "*Provided, however*, That if the goods are hidden from view by wrapping, boxing, or other means, and the carrier is not notified as to the character of the goods, the carrier may require the shipper to specifically state in writing the value of the goods, and the carrier shall not be liable beyond the

later, however, a proviso qualified that prohibition by rendering it inapplicable "first, to baggage carried on passenger trains . . . , or trains . . . carrying passengers; second, to property . . . received for transportation concerning which the carrier shall have been or shall hereafter be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released . . . ."[7]

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amount so specifically stated, in which case the Interstate Commerce Commission may establish and maintain rates for transportation, dependent upon the value of the property shipped as specifically stated in writing by the shipper." The object of the legislation was the imposition of full liability on carriers except (1) "where the property shipped is hidden from view by wrapping, [so] that the representation as to value made by the shipper [should] in all cases be binding upon him"; (2) where the Interstate Commerce Commission authorizes rates based upon value as represented by the shipper, in which case the carrier's liability is limited to the represented value. S. Rep. No. 407, 63d Cong., 2d Sess., p. 3; H. R. Rep. No. 1341, 63d Cong., 3d Sess., p. 2. The Commission held the first exception applicable to transportation of passenger baggage and recognized carriers' right to promulgate pertinent terms and conditions dependent on passengers' declared valuations. *In re The Cummins Amendment*, 33 I. C. C. 682, 696–697 (1915). In the following year, Congress in effect overruled that determination. See note 7, *infra*.

[7] 39 Stat. 442, 49 U. S. C. § 20 (11). The Committee Report accompanying the 1916 legislation observed in reference to the 1915 proviso: "The construction put upon the proviso by the Interstate Commerce Commission has resulted in some vexatious requirements insisted upon by carriers and in some injustice. For instance, it has been held by the commission that under the proviso the carrier may compel the shipper to state the value of the goods tendered for shipment and that if the true value is not stated the shipper is liable

We assume that petitioner's tariff was properly filed pursuant to a lawful authorization by the Interstate Commerce Commission. In *Stopher* v. *Cincinnati Union Terminal Co.*, 246 I. C. C. 41, 44–47 (1941), the Commission determined that an interstate railroad's redcap services constituted railroad transportation as defined by the Act, and directed that a tariff covering service charges be filed.* See also *Dayton Union R. Co. Tariff for Redcap Service*, 256 I. C. C. 289 (1943); *Redcap Service, Cincinnati, Columbus, Indianapolis*, 277 I. C. C. 427 (1950). Petitioner railroad participated in filing New England Joint Tariff RC No. 3–N with the Commission. Cf. *American Railway Express Co.* v. *Lindenburg*, 260 U. S. 584, 588–589 (1923). In addition to listing a schedule of charges per piece and truckload of baggage, that tariff de-

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to criminal prosecution under section 10 of the act to regulate commerce. The committee does not agree with the commission in the interpretation so placed upon the proviso, but there is no way in which to remedy the matter except to make the intent of Congress so clear that it is impossible to misunderstand it. Further, the commission has held that *baggage carried on passenger trains upon the ticket of a passenger* is within the terms of the law. Whether this construction is correct or incorrect, it is palpable that *baggage so transported on a passenger fare* ought not to be subject to the rule which controls ordinary freight, and in the bill now reported it is excepted in express terms." Congress eliminated the 1915 proviso, therefore, and explained the aim of the 1916 legislation "to restore the law of full liability as it existed prior to the Carmack amendment of 1906, so that when property is lost or damaged in the course of transportation under such circumstances as to make the carrier liable recovery is had for full value or on the basis of full value. From this general rule there is excepted, first, baggage carried on passenger trains. This is done for obvious reasons. Second, other property . . . , with respect to which the Interstate Commerce Commission has fixed or authorized affirmatively a rate dependent upon value, either an agreed or a released value." (Emphasis added.) S. Rep. No. 394, 64th Cong., 1st Sess., p. 2.

* See 49 U. S. C. §§ 1 (1), 1 (3), 1 (5) (a), 6 (1).

clares that "Carriers will not accept a greater liability than Twenty-five (25) Dollars per bag or parcel . . . handled by Red Caps under the provisions of this tariff, unless a greater value is declared in writing by the passenger. If a greater value is so declared in writing by the passenger, an additional charge of Ten (10) Cents per bag or parcel will be made for each One Hundred (100) Dollars or fraction thereof above Twenty-five (25) Dollars so declared. Any bag or parcel which is declared by the passenger to have a value in excess of Five Hundred (500) Dollars will not be accepted for handling by Red Caps under the provisions of this tariff."

Clearly that limitation of liability is voided by the Act unless saved by the statutory proviso. *Adams Express Co.* v. *Darden*, 265 U. S. 265 (1924); *Chicago, M. & St. P. R. Co.* v. *McCaull-Dinsmore Co.*, 253 U. S. 97 (1920). The excepted "baggage carried on passenger trains" refers solely to free baggage checked through on a passenger fare. See, *e. g.*, *Boston & Maine R. Co.* v. *Hooker*, 233 U. S. 97, 117 (1914).[9] It cannot apply to redcap service for which the carrier exacts a separate charge because the cost of providing that facility is not an element in the determination of passenger rates. *Redcap Service, Cincinnati, Columbus, Indianapolis*, 277 I. C. C. 427, 436 (1950).[10] The limitation must therefore qualify under

[9] Cf. 49 U. S. C. § 22, referring to "free baggage" carried on passenger tickets. See also notes 7, *supra*, and 10, *infra*.

[10] That distinction has long been recognized by the Commission. *National Baggage Committee* v. *Atchison, T. & S. F. R. Co.*, 32 I. C. C. 152 (1914); *In re The Cummins Amendment*, 33 I. C. C. 682, 696 (1915); *Ellison-White Chautauqua System* v. *Director General*, 68 I. C. C. 492, 495 (1922). In fact, only recently the Commission disallowed a proposed tariff of charges for passenger baggage because of "the long and universally established practice of permitting a reasonable amount of a passenger's baggage, whether in the baggage

the proviso as part of an authorized schedule of rates graduated according to property valuations *in writing*. Petitioner's tariff on its face does not deviate from the statutory standard, and it may be read as complying with the law. Cf. *American Railway Express Co.* v. *Lindenburg, supra; Cincinnati, N. O. & T. P. R. Co.* v. *Rankin*, 241 U. S. 319, 327 (1916).

But the facts here do not bring the case within the statutory conditions. There was no "value declared in writing by the shipper or agreed upon in writing"; in fact, not even a baggage check reciting a limitation provision changed hands.[11] Moreover, the actual value of respondent's baggage exceeded $500; the tariff itself deems such highly valued property unacceptable for handling by redcaps. But only by granting its customers a fair opportunity to choose between higher or lower liability by paying a correspondingly greater or lesser charge can a carrier lawfully limit recovery to an amount less than the actual loss sustained. *Boston & Maine R. Co.* v. *Piper*, 246 U. S. 439, 444–445 (1918); *Union Pacific R. Co.* v. *Burke*, 255 U. S. 317, 321–323 (1921); cf. *The Ansaldo San Giorgio I* v. *Rheinstrom Bros. Co.*, 294 U. S. 494, 497–498 (1935). Binding respondent by a limitation which she had no reasonable opportunity to discover

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car or in his personal possession, to be carried as a part of the passenger-fare contract, and the apparently uniform sanction of such a practice by the courts and the regulatory bodies." *Service Charges for Checking Baggage*, 288 I. C. C. 691, 695 (1953).

[11] See *Caten* v. *Salt City Movers & Storage Co.*, 149 F. 2d 428, 432 (1945). We need not now consider whether an inscribed baggage receipt would constitute a sufficient writing to satisfy the statute, compare *American Railway Express Co.* v. *Lindenburg*, 260 U. S. 584, 590–591 (1923), or whether a carrier's refusal to handle property above a certain value is permissible at all.

would effectively deprive her of the requisite choice;[12] such an arrangement would amount to a forbidden attempt to exonerate a carrier from the consequences of its own negligent acts. *Ibid.*; cf. *Watson Bros. Transp. Co.* v. *Feinberg Co.*, 193 F. 2d 283, 286 (1951). "The great object of the law governing common carriers was to secure the utmost care in the rendering of a service of the highest importance to the community. A carrier who stipulates not to be bound to the exercise of care and diligence 'seeks to put off the *essential duties* of his employment.' It is recognized that the carrier and the individual customer are not on an equal footing. 'The latter cannot afford to higgle or stand out and seek redress in the courts.'" *Sante Fe, P. & P. R. Co.* v. *Grant Bros. Construction Co.*, 228 U. S. 177, 184–185 (1913). In sum, respondent cannot be held bound by petitioner's limitation, and the judgment of the Connecticut Supreme Court of Errors must be

Affirmed.

MR. JUSTICE JACKSON took no part in the consideration or decision of this case.

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[12] *Boston & Maine R. Co.* v. *Hooker*, 233 U. S. 97 (1914), and *New York Central R. Co.* v. *Beaham*, 242 U. S. 148 (1916), cannot control this case. Neither decision involved the Act as amended by the 1915 and 1916 legislation; both dealt with free baggage checked through on a passenger ticket; the carrier in both cases had supplied some notice of its limitation of liability. In *Galveston, H. & S. A. R. Co.* v. *Woodbury*, 254 U. S. 357 (1920), the sole issue raised or considered related to the interstate nature of the passenger's journey.

BURNS ET AL. *v.* WILSON, SECRETARY OF DEFENSE, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 422. Argued February 5, 1953.—Decided June 15, 1953.

Tried separately by courts-martial, petitioners were found guilty of murder and rape and sentenced to death. After exhausting all remedies available to them under the Revised Articles of War, 62 Stat. 627, petitioners applied to a Federal District Court for writs of habeas corpus, alleging that they had been denied due process of law in the proceedings leading to their convictions by the courts-martial. Respondents denied these allegations and attached to their answer copies of the records of the trials and of all proceedings by the military reviewing authorities, which showed plainly that the military courts had heard petitioners on every significant allegation urged before the District Court. After satisfying itself that the courts-martial had complete jurisdiction, the District Court dismissed the applications without hearing evidence and without further review. The Court of Appeals gave petitioners' allegations full consideration on their merits, reviewed the evidence in the record of the trial and other proceedings before the military courts, and affirmed. *Held:* Judgment affirmed. Pp. 138–146.

91 U. S. App. D. C. 208, 202 F. 2d 335, affirmed.

The District Court dismissed petitioners' applications for writs of habeas corpus. 104 F. Supp. 310, 312. The Court of Appeals affirmed. 91 U. S. App. D. C. 208, 202 F. 2d 335. This Court granted certiorari. 344 U. S. 903. At the time of the argument, February 5, 1953, Wilson, present Secretary of Defense, was substituted for Lovett, former Secretary of Defense. *Affirmed*, p. 146.

Robert L. Carter and *Frank D. Reeves* argued the cause for petitioners. With them on the brief were *Thurgood Marshall, Charles W. Quick* and *Herbert O. Reid.*

Solicitor General Cummings argued the cause for respondents. With him on the brief were *Assistant Attorney General Murray, Oscar H. Davis, Beatrice Rosenberg* and *Walter Kiechel, Jr.*

MR. CHIEF JUSTICE VINSON announced the judgment of the Court in an opinion in which MR. JUSTICE REED, MR. JUSTICE BURTON and MR. JUSTICE CLARK join.

Tried separately by Air Force courts-martial on the Island of Guam, petitioners were found guilty of murder and rape and sentenced to death. The sentences were confirmed by the President, and petitioners exhausted all remedies available to them under the Articles of War for review of their convictions by the military tribunals. They then filed petitions for writs of habeas corpus in the United States District Court for the District of Columbia.

In these applications petitioners alleged that they had been denied due process of law in the proceedings which led to their conviction by the courts-martial. They charged that they had been subjected to illegal detention; that coerced confessions had been extorted from them; that they had been denied counsel of their choice and denied effective representation; that the military authorities on Guam had suppressed evidence favorable to them, procured perjured testimony against them and otherwise interfered with the preparation of their defenses. Finally, petitioners charged that their trials were conducted in an atmosphere of terror and vengeance, conducive to mob violence instead of fair play.

The District Court dismissed the applications without hearing evidence, and without further review, after satisfying itself that the courts-martial which tried petitioners had jurisdiction over their persons at the time of the trial and jurisdiction over the crimes with which they were charged as well as jurisdiction to impose the sentences

which petitioners received. 104 F. Supp. 310, 312. The Court of Appeals affirmed the District Court's judgment, after expanding the scope of review by giving petitioners' allegations full consideration on their merits, reviewing in detail the mass of evidence to be found in the transcripts of the trial and other proceedings before the military court. 91 U. S. App. D. C. 208, 202 F. 2d 335.

We granted certiorari, 344 U. S. 903. Petitioners' allegations are serious, and, as reflected by the divergent bases for decision in the two courts below, the case poses important problems concerning the proper administration of the power of a civil court to review the judgment of a court-martial in a habeas corpus proceeding.

In this case, we are dealing with habeas corpus applicants who assert—rightly or wrongly—that they have been imprisoned and sentenced to death as a result of proceedings which denied them basic rights guaranteed by the Constitution. The federal civil courts have jurisdiction over such applications. By statute, Congress has charged them with the exercise of that power.[1] Accordingly, our initial concern is not whether the District Court has any power at all to consider petitioners' applications; rather our concern is with the manner in which the Court should proceed to exercise its power.

The statute which vests federal courts with jurisdiction over applications for habeas corpus from persons confined by the military courts is the same statute which vests them with jurisdiction over the applications of persons confined by the civil courts. But in military habeas corpus the inquiry, the scope of matters open for review, has always been more narrow than in civil cases. *Hiatt* v. *Brown*, 339 U. S. 103 (1950). Thus the law which governs a civil court in the exercise of its jurisdiction over military habeas corpus applications cannot simply be

[1] 28 U. S. C. § 2241. See *In re Yamashita*, 327 U. S. 1, 8 (1946).

assimilated to the law which governs the exercise of that power in other instances. It is *sui generis;* it must be so, because of the peculiar relationship between the civil and military law.

Military law, like state law, is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment.[2] This Court has played no role in its development; we have exerted no supervisory power over the courts which enforce it; the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment.[3] The Framers expressly entrusted that task to Congress.

Indeed, Congress has taken great care both to define the rights of those subject to military law, and provide a complete system of review within the military system to secure those rights. Only recently the Articles of War were completely revised, and thereafter, in conformity with its purpose to integrate the armed services, Congress established a Uniform Code of Military Justice applicable to all members of the military establishment.[4] These enactments were prompted by a desire to meet objections and criticisms lodged against court-martial procedures in the aftermath of World War II. Nor was

[2] See *Dynes* v. *Hoover*, 20 How. 65, 82 (1858); cf. *In re Vidal*, 179 U. S. 126 (1900); *Reaves* v. *Ainsworth*, 219 U. S. 296 (1911); *Ex parte Quirin*, 317 U. S. 1 (1942).

[3] See, *e. g.*, *In re Grimley*, 137 U. S. 147 (1890); *Hiatt* v. *Brown*, 339 U. S. 103 (1950).

[4] See 62 Stat. 627 (revised Articles of War), 64 Stat. 107 (the Uniform Code of Military Justice). For history of the evolution and purpose behind these enactments, see, *e. g.*, H. R. Rep. No. 1034, 80th Cong., 1st Sess.; S. Rep. No. 1268, 80th Cong., 2d Sess.; Report of the War Department Advisory Committee on Military Justice (1946); H. R. Rep. No. 491, 81st Cong., 1st Sess.; S. Rep. No. 486, 81st Cong., 1st Sess.

this a patchwork effort to plug loopholes in the old system of military justice. The revised Articles and the new Code are the result of painstaking study; they reflect an effort to reform and modernize the system—from top to bottom.[5]

Rigorous provisions guarantee a trial as free as possible from command influence, the right to prompt arraignment, the right to counsel of the accused's own choosing, and the right to secure witnesses and prepare an adequate defense.[6] The revised Articles, and their successor—the new Code—also establish a hierarchy within the military establishment to review the convictions of courts-martial, to ferret out irregularities in the trial, and to enforce the procedural safeguards which Congress determined to guarantee to those in the Nation's armed services.[7] And finally Congress has provided a special post-conviction remedy within the military establishment, apart from ordinary appellate review, whereby one convicted by a court-martial may attack collaterally the judgment under which he stands convicted.[8]

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[5] *Ibid.* See Holtzoff, *Administration of Justice in the United States Army*, 22 N. Y. U. L. Q. Rev. 1 (1947); Morgan, *The Background of The Uniform Code of Military Justice*, 6 Vand. L. Rev. 169 (1953).

[6] For provisions to this effect in the revised Articles of War, see, *e. g.*, 10 U. S. C. (Supp. II) §§ 1482, 1493, 1495, 1542, 1560. For provisions in the Uniform Code of Military Justice, see, *e. g.*, 50 U. S. C. (Supp. V) §§ 564, 567, 591, 602, 612, 621.

[7] 10 U. S. C. (Supp. II) § 1521. The Uniform Code of Military Justice established the Court of Military Appeals, which is composed of civilians. It automatically reviews all capital cases and has discretionary jurisdiction over other cases. It is the highest court in the military system. 50 U. S. C. (Supp. V) § 654. See Walker and Niebank, *The Court of Military Appeals—Its History, Organization and Operation*, 6 Vand. L. Rev. 228 (1953).

[8] 62 Stat. 639, 10 U. S. C. (Supp. III) § 1525. See *Gusik* v. *Schilder*, 340 U. S. 128 (1950). This provision was also made a part of the Uniform Code of Military Justice. 64 Stat. 132, 50 U. S. C. (Supp. V) § 660; 64 Stat. 147, 50 U. S. C. (Supp. V) § 740.

The military courts, like the state courts, have the same responsibilities as do the federal courts to protect a person from a violation of his constitutional rights. In military habeas corpus cases, even more than in state habeas corpus cases, it would be in disregard of the statutory scheme if the federal civil courts failed to take account of the prior proceedings—of the fair determinations of the military tribunals after all military remedies have been exhausted. Congress has provided that these determinations are "final" and "binding" upon all courts.[8] We have held before that this does not displace the civil courts' jurisdiction over an application for habeas corpus from the military prisoner. *Gusik* v. *Schilder*, 340 U. S. 128 (1950). But these provisions do mean that when a military decision has dealt fully and fairly with an allegation raised in that application, it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence. *Whelchel* v. *McDonald*, 340 U. S. 122 (1950).

We turn, then, to this case.

Petitioners' applications, as has been noted, set forth serious charges—allegations which, in their cumulative effect, were sufficient to depict fundamental unfairness in the process whereby their guilt was determined and their death sentences rendered. Had the military courts manifestly refused to consider those claims, the District Court was empowered to review them *de novo*. For the constitutional guarantee of due process is meaningful enough, and sufficiently adaptable, to protect soldiers—as well as civilians—from the crude injustices of a trial so conducted that it becomes bent on fixing guilt by dispensing with rudimentary fairness rather than finding

[8] The revisions of the Articles of War, 10 U. S. C. (Supp. II) § 1521 (h), and the Uniform Code of Military Justice, 50 U. S. C. (Supp. V) § 663, both provided that the decisions of the appellate military tribunals should be "final" and should be "binding" upon the courts.

truth through adherence to those basic guarantees which have long been recognized and honored by the military courts as well as the civil courts.

Petitioners asserted: they had been arrested and confined incommunicado by officers of the military government of Guam; they were mistreated and subjected to continuous questioning without being informed of their rights; petitioner Dennis finally confessed, after police officers confronted him with the confession of Calvin Dennis—an alleged accomplice in the crime; after a period of about three weeks of this confinement, the petitioners were turned over to the Air Force; the military authorities "planted" real evidence—the victim's smock with hairs from petitioner Dennis' body attached—in a truck which petitioners had driven on the night of the crime; they further sought to "contrive" a conviction by coercing various witnesses to testify against petitioners; both petitioners were denied the benefit of counsel until a short while before trial, and petitioner Dennis was denied representation of his choice when counsel he sought was removed from the case by the commanding officer of his unit; the trial was conducted in an atmosphere of "hysteria" because the crime had been particularly brutal and the authorities had "created" a demand for vengeance; the "coerced" confessions were admitted at the trial and so was the incriminating confession of Calvin Dennis—which had been procured by threats and deceit.[10]

Answering the habeas corpus applications, respondents denied that there had been any violation of petitioners'

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[10] Petitioners submitted the affidavits of petitioner Dennis, an Air Force chaplain, a former federal civilian employee on Guam and Col. Daly, a former Air Force officer who had been attached to the Judge Advocate's staff on Guam, and who was, apparently, originally to have been defense counsel to the accused.

These affidavits tended to back up the general allegations set forth in the applications for habeas corpus.

rights and attached to their answer copies of the record of each trial, the review of the Staff Judge Advocate, the decision of the Board of Review in the office of the Judge Advocate General, the decision (after briefs and oral argument) of the Judicial Council in the Judge Advocate General's office, the recommendation of the Judge Advocate General, the action of the President confirming the sentences, and also the decision of the Judge Advocate General denying petitions for new trials under Article 53 of the Articles of War.

These records make it plain that the military courts have heard petitioners out on every significant allegation which they now urge. Accordingly, it is not the duty of the civil courts simply to repeat that process—to re-examine and reweigh each item of evidence of the occurrence of events which tend to prove or disprove one of the allegations in the applications for habeas corpus. It is the limited function of the civil courts to determine whether the military have given fair consideration to each of these claims. *Whelchel* v. *McDonald*, *supra*. We think they have.

The military reviewing courts scrutinized the trial records before rejecting petitioners' contentions. In lengthy opinions, they concluded that petitioners had been accorded a complete opportunity to establish the authenticity of their allegations, and had failed. Thus, the trial records were analyzed to show that the circumstances fully justified the decision to remove Dennis' original choice of defense counsel; [11] that each petitioner had

[11] See *Hiatt* v. *Brown*, 339 U. S. 103 (1950). Dennis asked to be represented by one Lt. Col. Daly. This officer, prior to the trial, was charged with serious misconduct and moral turpitude. When informed of this, Dennis announced his satisfaction with the "regularly appointed defense counsel." At his trial, however, Dennis again asked if Daly could assist in his defense. The court was then fully informed concerning Daly's arrest and his dubious status, and

declared, at the beginning of his trial, that he was ready to proceed; that each was ably represented; that the trials proceeded in an orderly fashion—with that calm degree of dispassion essential to a fair hearing on the question of guilt; that there was exhaustive inquiry into the background of the confessions—with the taking of testimony from the persons most concerned with the making of these statements, including petitioner Dennis who elected to take the stand.[12] And finally it was demonstrated that the issues arising from the charges relating to the use of perjured testimony and planted evidence were either explored or were available for exploration at the trial.[13]

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it sustained the commanding officer's determination that Daly was not "available" to participate in the trial. Dennis was represented by another officer who had been appointed a full month before. Defense counsel was assisted by two other legal officers who had also participated in the pretrial investigation of the case.

[12] We reject petitioners' contentions that the rule of *McNabb* v. *United States*, 318 U. S. 332 (1943), renders the confessions inadmissible and requires the civil courts to hold that the courts-martial were void. The *McNabb* rule is a rule of evidence in the federal civil courts; its source is not "due process of law," but this Court's power of "supervision of the administration of criminal justice in the federal courts." See 318 U. S., at 340; cf. *Gallegos* v. *Nebraska*, 342 U. S. 55 (1951). We have of course no such supervisory power over the admissibility of evidence in courts-martial.

[13] The allegations in the applications for habeas corpus relating to perjured and "planted" evidence were supported by the affidavits of Col. Daly and Mrs. Hill, the federal civilian employee. But they were both witnesses for the defense at the Dennis trial, and Daly was a witness for the prosecution in the Burns trial. Many of the matters covered in the Daly and Hill affidavits were covered at the trial; opportunity was available to question each witness about his or her relationship with the investigation of the case.

Moreover we note that the Judge Advocate General, during review of this case under former Article of War 53 (now 50 U. S. C. (Supp. V) § 740), ordered a special investigation by the office of the Inspector General of some of the Daly and Hill charges, and concluded

Petitioners have failed to show that this military review was legally inadequate to resolve the claims which they have urged upon the civil courts. They simply demand an opportunity to make a new record, to prove *de novo* in the District Court precisely the case which they failed to prove in the military courts. We think, under the circumstances, that due regard for the limitations on a civil court's power to grant such relief precludes such action. We think that although the Court of Appeals may have erred in reweighing each item of relevant evidence in the trial record, it certainly did not err in holding that there was no need for a further hearing in the District Court. Accordingly its judgment must be

Affirmed.

MR. JUSTICE JACKSON concurs in the result.

MR. JUSTICE MINTON, concurring in the affirmance of the judgment.

I do not agree that the federal civil courts sit to protect the constitutional rights of military defendants, except to the limited extent indicated below. Their rights are committed by the Constitution [1] and by Congress acting in pursuance thereof [2] to the protection of the military courts, with review in some instances by the President. Nor do we sit to review errors of law committed by military courts.

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that they were unfounded. This report is not a part of the record, and we cannot rely upon it to sustain our conclusions, but we can cite it as an example of the efforts of the military to resolve and not ignore petitioners' charges.

[1] Art. I, § 8, cl. 14.

[2] This particular case comes up under the former Revised Articles of War, 62 Stat. 627, now supplanted by the Uniform Code of Military Justice, 64 Stat. 107, 50 U. S. C. (Supp. V) § 551 *et seq.*

This grant to set up military courts is as distinct as the grant to set up civil courts. Congress has acted to implement both grants. Each hierarchy of courts is distinct from the other. We have no supervisory power over the administration of military justice, such as we have over civil justice in the federal courts. Due process of law for military personnel is what Congress has provided for them in the military hierarchy in courts established according to law. If the court is thus established, its action is not reviewable here. Such military court's jurisdiction is exclusive but for the exceptions contained in the statute, and the civil courts are not mentioned in the exceptions. 64 Stat. 115, 50 U. S. C. (Supp. V) § 581.

If error is made by the military courts, to which Congress has committed the protection of the rights of military personnel, that error must be corrected in the military hierarchy of courts provided by Congress. We have but one function, namely, to see that the military court has jurisdiction, not whether it has committed error in the exercise of that jurisdiction.

The rule was clearly stated in the early case of *In re Grimley*, 137 U. S. 147, 150, in these words:

> "It cannot be doubted that the civil courts may in any case inquire into the jurisdiction of a court-martial, and if it appears that the party condemned was not amenable to its jurisdiction, may discharge him from the sentence. And, on the other hand, it is equally clear that by *habeas corpus* the civil courts exercise no supervisory or correcting power over the proceedings of a court-martial; and that no mere errors in their proceedings are open to consideration. The single inquiry, the test, is jurisdiction. . . ."

This case was cited and an excerpt from the above quoted with approval in *Hiatt* v. *Brown*, 339 U. S. 103, 111. After approving *In re Grimley*, we rejected the

broader claim of the respondent for review to determine whether certain action of the military court had denied him due process of law and said:

> "In this case the court-martial had jurisdiction of the person accused and the offense charged, and acted within its lawful powers. The correction of any errors it may have committed is for the military authorities which are alone authorized to review its decision. . . ."

With this understanding, I concur in affirming the judgment.

MR. JUSTICE FRANKFURTER.

This case raises questions of great delicacy and difficulty. On the one hand is proper regard for habeas corpus, "the great writ of liberty"; on the other hand the duty of civil courts to abstain from intervening in matters constitutionally committed to military justice. The case comes to us on a division of opinion in the Court of Appeals. In the interest of enabling indigent litigants to have the case reviewed in this Court without incurring the enormous cost of printing, we have required to be brought here only one copy of a record consisting of a mass of materials in their original form. Consideration of the case has fallen at the close of the Term. Obviously it has not been possible for every member of the Court to examine such a record. In any event there has not been time for its consideration by me. An examination of it, however, is imperative in view of what seem to me to be the essential issues to be canvassed. I can now only outline the legal issues that are implicit in the case.

The right to invoke habeas corpus to secure freedom is not to be confined by any *a priori* or technical notions of "jurisdiction." See my dissent in *Sunal* v. *Large*, 332 U. S. 174, 184. And so, if imprisonment is the result of a

denial of due process, it may be challenged no matter under what authority of Government it was brought about. Congress itself in the exercise of the war power "is subject to applicable constitutional limitations." *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146, 156. It is therefore not freed from the requirements of due process of the Fifth Amendment. But there is no table of weights and measures for ascertaining what constitutes due process. Indeed, it was common ground, in the majority and dissenting opinions below, that due process, in the language of Judge Bazelon, is not "the same in a military setting as it is in a civil setting." 91 U. S. App. D. C. 208, at 225, 202 F. 2d 335, at 352.

I cannot agree that the only inquiry that is open on an application for habeas corpus challenging a sentence of a military tribunal is whether that tribunal was legally constituted and had jurisdiction, technically speaking, over the person and the crime. Again, I cannot agree that the scope of inquiry is the same as that open to us on review of State convictions; the content of due process in civil trials does not control what is due process in military trials. Nor is the duty of the civil courts upon habeas corpus met simply when it is found that the military sentence has been reviewed by the military hierarchy, although in a debatable situation we should no doubt attach more weight to the conclusions reached on controversial facts by military appellate courts than to those reached by the highest court of a State.

In the light of these considerations I cannot assume the responsibility, where life is at stake, of concurring in the judgment of the Court. Equally, however, I would not feel justified in reversing the judgment. My duty, as I see it, is to resolve the dilemma by doing neither. It is my view that this is not just a case involving individuals. Issues of far-reaching import are at stake which call for further consideration. They were not explored in all

their significance in the submissions made to the Court. While this case arose prior to the new Code of Military Justice, 64 Stat. 107, it necessarily will have a strong bearing upon the relations of the civil courts to the new Court of Military Appeals. The short of it is that I believe this case should be set down for reargument.*

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK concurs, dissenting.

The charges which are made concerning the confessions exacted from these accused are quite lurid. But the basic, undisputed facts, though not dramatic, leave the clear impression that one of the petitioners was held incommunicado and repeatedly examined over a 5-day period until he confessed.

Herman Dennis.—On January 7, 1949, Herman Dennis was taken into custody by the civil authorities. (At this time Guam was under a government supervised by the Navy.) He was asked or told to give consent to take a lie detector test. He was given the test and thereafter confined. Instructions were issued that he was to talk to no one except the two investigators, one the Assistant Chief of Police of Guam, and the other a member of the Berkeley, California, police department who had been called in to assist in the solution of the crime. Dennis was questioned intermittently by these two officers from Friday, January 7, until Tuesday, January 11. On the latter date he was informed that his "half brother," Calvin Dennis, had confessed. He refused to believe it. Calvin was brought before him and asked if he had confessed. Calvin answered "yes" and was immediately taken away.

During the evening of January 11, Herman agreed to confess and executed two hand-written notes. The investigators left him alone at about midnight. The next

*[See also further opinion of MR. JUSTICE FRANKFURTER, *post*, p. 844.]

morning he was taken to an office and, in the presence of several officers, he made a confession which was typed and signed by Herman on each page. He made another such statement the next day, January 13, 1949. Later he repudiated all his confessions.

He was taken before a magistrate on January 17, 1949, and turned over to the military authorities on January 29, 1949. He was formally charged with rape and murder on February 1, 1949, and tried by general court-martial from May 9 to May 16, 1949. The confessions were introduced over objection by the defense. Herman took the stand and testified that they were involuntary and untruthful. The trial resulted in conviction and sentence of death.

Robert Burns.—This defendant was taken into custody by the civil authorities on January 7, 1949. He was turned over to the military on January 30, 1949. He did not confess. He was formally charged with rape and murder on February 20, 1949, and was tried by general court-martial from May 27, 1949, to May 30, 1949. Calvin Dennis testified against him. It appears that Calvin had previously been tried and convicted of the same crimes and sentenced to death. His sentence was later commuted to life imprisonment by the President.

Those are the undisputed facts concerning the confessions.

The role of Calvin Dennis is not too clear; and he is not a petitioner here. But it appears that he was arrested at the same time as the others and confessed some time between Friday, January 7 and Tuesday, January 11. His affidavit attached to the petition below alleges that he was beaten and forced to confess and that the authorities promised him money and a light sentence if he would implicate the others. He says that his testimony at the Burns trial was false and given under duress. Both he and Herman now state that they are not half brothers and are in fact in no way related.

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I think petitioners are entitled to a judicial hearing on the circumstances surrounding their confessions.

Congress has power by Art. I, § 8, cl. 14 of the Constitution "To make Rules for the Government and Regulation of the land and naval Forces." The rules which Congress has made relative to trials for offenses by military personnel are contained in the Uniform Code of Military Justice. 64 Stat. 108, 50 U. S. C. § 551 *et seq.* Those rules do not provide for judicial review. But it is clear from our decisions that habeas corpus may be used to review some aspects of a military trial.

The question whether the military tribunal has exceeded the powers granted it by Congress may be tested by habeas corpus. See *Hiatt* v. *Brown*, 339 U. S. 103; *Whelchel* v. *McDonald*, 340 U. S. 122; *Gusik* v. *Schilder*, 340 U. S. 128. But it is also clear that that review is not limited to questions of "jurisdiction" in the historic sense.

Of course the military tribunals are not governed by the procedure for trials prescribed in the Fifth and Sixth Amendments. That is the meaning of *Ex parte Quirin*, 317 U. S. 1, holding that indictment by grand jury and trial by jury are not constitutional requirements for trials before military commissions. Nor do the courts sit in review of the weight of the evidence before the military tribunal. *Whelchel* v. *McDonald*, *supra*, p. 124. But never have we held that all the rights covered by the Fifth and the Sixth Amendments were abrogated by Art. I, § 8, cl. 14 of the Constitution, empowering Congress to make rules for the armed forces. I think it plain from the text of the Fifth Amendment that that position is untenable. The Fifth Amendment provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia,

when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

What reason is there for making one specific exception for cases arising in the land or naval forces or in the militia if none of the Fifth Amendment is applicable to military trials? Since the requirement for indictment before trial is the only provision of the Fifth Amendment made inapplicable to military trials, it seems to me clear that the other relevant requirements of the Fifth Amendment (including the ban on coerced confessions) are applicable to them. And if the ban on coerced confessions is applicable, how can it mean one thing in civil trials and another in military trials?

The prohibition against double jeopardy is one of those provisions. And consistently with the construction I urge, we held in *Wade* v. *Hunter,* 336 U. S. 684, 690, that court-martial action was subject to that requirement of the Fifth Amendment. The mandates that no person be compelled to be a witness against himself or be deprived of life or liberty without due process of law are as specific and as clear. They too, as the Court of Appeals held, are constitutional requirements binding on military tribunals.

If a prisoner is coerced by torture or other methods to give the evidence against him, if he is beaten or slowly "broken" by third-degree methods, then the "trial" before the military tribunal becomes an empty ritual. The real trial takes place in secret where the accused without benefit of counsel succumbs to physical or psychological pressures. A soldier or sailor convicted in that manner has

been denied due process of law; and, like the accused in criminal cases (see *Moore* v. *Dempsey*, 261 U. S. 86; *Johnson* v. *Zerbst*, 304 U. S. 458; *Walker* v. *Johnston*, 312 U. S. 275; *Pyle* v. *Kansas*, 317 U. S. 213; *Von Moltke* v. *Gillies*, 332 U. S. 708), he should have relief by way of habeas corpus.

The opinion of the Court is not necessarily opposed to this view. But the Court gives binding effect to the ruling of the military tribunal on the constitutional question, provided it has given fair consideration to it.

If the military agency has fairly and conscientiously applied the standards of due process formulated by this Court, I would agree that a rehash of the same facts by a federal court would not advance the cause of justice. But where the military reviewing agency has not done that, a court should entertain the petition for habeas corpus. In the first place, the military tribunals in question are federal agencies subject to no other judicial supervision except what is afforded by the federal courts. In the second place, the rules of due process which they apply are constitutional rules which we, not they, formulate.

The *undisputed* facts in this case make a prima facie case that our rule on coerced confessions expressed in *Watts* v. *Indiana*, 338 U. S. 49, was violated here. No court has considered the question whether repetitious questioning over a period of 5 days while the accused was held incommunicado without benefit of counsel violated the Fifth Amendent. The highest reviewing officer, the Judge Advocate General of the Air Force, said only this:

> "After reading and re-reading the record of trial, there is no reasonable doubt in my mind that all the confessions were wholly voluntary, as the court decided, and were properly admitted. Where the evidence as to whether there was coercion is conflict-

ing, or where different inferences may fairly be drawn from the admitted facts, the question whether a confession was voluntary is for the triers of the facts (*Lyons* v. *Oklahoma*, 322 U. S. 596; *Lisenba* v. *California*, 314 U. S. 219). Thus the court's decision on the voluntary nature of the testimony, arrived at from first-hand hearing and observation, is presumptively correct and will not be disturbed unless manifestly erroneous (*MGM Corporation* v. *Fear*, 104 F. 2d 892; ACM 3597, *Maddle*, 4 Court-Martial Reports [AF] 573)."

There has been at no time any considered appraisal of the facts surrounding these confessions in light of our opinions. Before these men go to their death, such an appraisal should be made.

STEIN *v.* NEW YORK.

NO. 391. CERTIORARI TO THE COURT OF APPEALS OF NEW YORK.*

Argued December 18, 1952.—Decided June 15, 1953.

In a New York state court, a jury found the three petitioners guilty of murder, and they were sentenced to death. The murder allegedly was committed while petitioners, and an accomplice who turned state's evidence, were engaged in an armed holdup. The evidence at the trial included separate written confessions by two of the petitioners. Each written confession implicated all three petitioners and all objected to introduction of each confession on the ground that it was coerced. The trial court denied a motion by the third petitioner that, if the confessions were admitted, all reference to him be stricken from them. The court heard evidence in the presence of the jury as to the issue of coercion and left determination of that issue to the jury, which rendered a general verdict of guilty. The New York Court of Appeals affirmed without opinion. *Held:* There was no violation of the Fourteenth Amendment in the proceedings, and the judgments are affirmed. Pp. 159–197.

1. Petitioners were not denied a fair hearing on the coercion issue. Pp. 170–179.

(a) The Fourteenth Amendment cannot be construed as allowing petitioners to testify to their coercion by the police without becoming subject to any cross-examination. Pp. 174–176.

(b) In the trial of a coercion issue, as of every other issue, when the prosecution has made a case to go to the jury, an accused must choose between the disadvantage from silence and that from testifying. P. 177.

(c) The Fourteenth Amendment does not forbid jury trial of the issue whether a confession was coerced; nor does it forbid its submission to a jury tentatively and with proper instructions along with the issue of guilt, although a general verdict of guilty

*Together with No. 392, *Wissner* v. *New York*, and No. 393, *Cooper* v. *New York*, also on certiorari to the same court.

does not disclose the jury's decision on the issue of coercion. Pp. 177–179.

2. On the record in this case, it did not violate the Fourteenth Amendment if the jury resolved that the confessions were admissible as a basis for conviction. Pp. 179–188.

(a) When the issue as to whether confessions were coerced has been fairly tried and reviewed by the courts of a State, and there is no indication that constitutional standards of judgment have been disregarded, this Court will accept the state's determination of the issue, in the absence of impeachment by conceded facts. Pp. 180–182.

(b) Upon the evidence in this case, the state courts could properly find that the confessions were not obtained by physical force or threats. Pp. 182–184.

(c) Upon the evidence in this case, the state courts could properly find that the confessions were not obtained by psychological coercion. Pp. 184–186.

(d) The illegal delay in the arraignment of petitioners did not alone require rejection of the confessions under the Fourteenth Amendment. Pp. 186–188.

3. If the jury rejected the confessions, it could constitutionally base a conviction on other sufficient evidence. Pp. 188–194.

(a) There was no constitutional error in the trial court's refusal of petitioners' request for instruction to the jury that, if it found the confessions to have been coerced, it must return a verdict of acquittal. Pp. 188–193.

(b) The submission of a confession to a state jury tentatively and under proper instructions for judgment of the coercion issue does not preclude a conviction on other sufficient evidence if it rejects the confession. P. 190.

(c) The other evidence of petitioners' guilt, consisting of direct testimony of the surviving victim and of a well-corroborated accomplice, as well as incriminating circumstances unexplained, is such that, apart from the confessions, it could not be held constitutionally or legally insufficient to warrant the jury verdict. Pp. 190–192.

(d) The Fourteenth Amendment does not enact a rigid exclusionary rule of evidence rather than a guarantee against conviction on inherently untrustworthy evidence. Pp. 192–193.

(e) Whatever may have been the grounds of the New York Court of Appeals' affirmance of the judgments in this case, the

decision here is based, not upon the ground of harmless error, but upon the ground that there was no constitutional error. Pp. 193–194.

4. As to the third petitioner's objections relating to the admissibility of the confessions to which he was not a party, there was no constitutional error such as would justify setting aside his conviction. Pp. 194–196.

(a) The holding that it was permissible for the state courts to find that the confessions were voluntary takes away the support for this objection in this Court. P. 194.

(b) In the light of the other testimony in the case, the deletion of this petitioner's name from the confessions would not have helped him. P. 194.

(c) This petitioner's rights under the Fourteenth Amendment were not infringed by the fact that he was unable to cross-examine the confessors. P. 195.

(d) The hearsay-evidence rule, with all its subtleties, anomalies and ramifications, is not embraced by the Fourteenth Amendment. P. 196.

(e) That the methods adopted by the New York courts to protect this petitioner against any disadvantage from the use of the confessions may not have been the most effective conceivable, does not render them violative of the Fourteenth Amendment. P. 196.

5. On the record in this case, there is no justification for reading the Fourteenth Amendment to deny the State the power to hold these petitioners guilty. Pp. 196–197.

303 N. Y. 856, 104 N. E. 2d 917, affirmed.

In a prosecution in a New York state court for murder, petitioners were convicted by a jury and sentenced to death. The New York Court of Appeals affirmed. 303 N. Y. 856, 104 N. E. 2d 917. This Court granted certiorari, limited to the question of the admissibility of the confessions. 344 U. S. 815. *Affirmed*, p. 197.

John J. Duff, J. Bertram Wegman and *Peter L. F. Sabbatino* argued the causes for petitioners. With *Mr. Duff* on the brief for petitioner in No. 391 was *Philip J.*

O'Brien. With *Mr. Wegman* on the brief for petitioner in No. 392 were *I. Maurice Wormser* and *Richard J. Burke*. With *Mr. Sabbatino* on the brief for petitioner in No. 393 was *Thomas J. Todarelli*.

John J. O'Brien and *John C. Marbach* argued the cause for respondent. With them on the brief was *Burton C. Meighan*.

Mr. Justice Jackson delivered the opinion of the Court.

Petitioners were found guilty of felony murder[1] by a jury in Westchester County, New York, and sentenced to death. The New York Court of Appeals affirmed without opinion.[2] We granted certiorari, because of questions raised by use of two confessions.[3]

The trial lasted over seven weeks and the record runs to more than 3,000 pages. Evidence proffered and heard, subject to rejection or acceptance in the judgment of the jury, included two written confessions by petitioners Cooper and Stein, together with testimony as to their incidental oral confessions and admissions. Each written confession implicated all three defendants and all objected to introduction of each confession on the ground that it was coerced. Wissner further moved as to each that, if Cooper's and Stein's confessions were admitted, all reference to him be stricken from them. The trial court heard evidence in the presence of the jury as to the issue of coercion and left determination of the question

[1] A homicide committed by a person engaged in the commission of a felony. It is first-degree murder and carries a mandatory death sentence unless the jury recommends life imprisonment. New York Penal Law, §§ 1044 (2), 1045, 1045-a. No such recommendation was made here.

[2] *People* v. *Cooper*, 303 N. Y. 856, 104 N. E. 2d 917.

[3] 344 U. S. 815.

to the jury. Petitioners claim that such use of these confessions creates a constitutional infirmity which requires this Court to set aside the conviction.

I. Facts About the Crime.

The main office of Reader's Digest is thirty-one miles from New York City, in the relatively rural area of northern Westchester County, near the town of Pleasantville. From this secluded headquarters a truck several times each day makes a run to and from town. On April 3, 1950, William Waterbury was driver of the 2:50 p. m. trip into Pleasantville. He picked up Andrew Petrini, a fellow employee, and various bags containing mail, about $5,000 in cash, and about $35,000 in checks, and started down the lonely country roads to town. Neither was armed. After a few hundred yards, Waterbury was cut off and halted by another truck that had been meandering slowly in front of him. He observed a man wearing a false nose and eyeglasses and with a revolver in his hand running toward him. After an unsuccessful attempt to open the door, the assailant fired one shot into Petrini's head. Waterbury was then ordered into the back of the truck where another man tied him up. His captors took the bag containing the money and checks and abandoned the truck on a side road with Waterbury bound and gagged therein. A few minutes later he was released by a passer-by and had Petrini hurried to the hospital where he died shortly from the effects of a .38 revolver bullet lodged in his skull.

Near the scene of the crime police found the abandoned truck used by the killers to block the way of Waterbury. It was learned to be the property of Spring Auto Rental Co., on New York's lower East Side and at the time of the murder to have been out on hire to a man who had rented the same truck on three prior occasions and who each time had identified himself by producing

New York driver's license No. 1434549, issued to W. W. Comins, of 228 West 47th Street, New York City. The address turned out to be a hotel and the name fictitious. However, the police managed to establish that the license had been procured by one William Cooper.

It is more than a figure of speech to say that William Cooper had an ironclad alibi: at the time of this crime he was serving a sentence in a federal penitentiary. Suspicion attached to members of his family. Nearly two months ran on with no solution of the crime, however, until toward the end of May or the beginning of June, when police learned that William's brother, petitioner Calman Cooper, had served a sentence in federal prison where he was a "working partner" and chess-playing buddy of one Brassett, who was serving time for having rifled mails addressed to the Reader's Digest while working in Pleasantville. It appeared that during their prison association Brassett had told Calman Cooper of the opportunity awaiting at Reader's Digest for an enterprising and clever robber.

On June 5, 1950, police arranged for Arthur Jeppeson, who had rented the Spring truck to "W. W. Comins," to be on a street in New York City where they expected Calman Cooper to pass. Jeppeson testified on the trial that Cooper recognized him and said to him that "this truck that he rented from me was in a killing upstate and he had nothing to do with it . . . ." Jeppeson testified that he then asked Cooper two questions: "Why the hell didn't you report it to the police?" and ". . . why did he give me that license . . . ."? Cooper's reply was stated to be, "That is the license they give him to give me." Jeppeson further testified that Cooper had inquired if the officers had shown him any pictures and asked him not to identify Cooper to the police.

At the end of this conversation, on Jeppeson's signal, two policemen closed in and arrested Cooper. That

night (2 a. m., June 6) petitioner Stein was arrested. On June 7, about 9 a. m., petitioner Wissner was arrested. The three petitioners were arraigned and charged with murder on the evening of June 8. A fourth suspect, Dorfman, was sought but remained at large until he voluntarily surrendered on June 19, 1950.

All four were indicted for murder. When the time came for trial, the case against Dorfman, who turned state's evidence, was severed. A motion for separate trial by petitioner Wissner was denied, and trial proceeded against the three remaining defendants.

Other than two alibi witnesses offered by Wissner and a halfhearted attempt by Cooper to establish insanity, the defense consisted almost entirely of attempts to break down the prosecution's case. None of the defendants testified.

The confessions constituted only a part of the evidence submitted to the jury. We can learn the context in which the confessions were obtained by the police and received in evidence only from a summary of the whole testimony.

Waterbury, who was in the truck with the murdered Petrini, identified Wissner as the man who fired the shot and Stein as the man who tied him up.[4] He testified that on the 8th of June the police brought him to Hawthorne Barracks and that, upon entering a room in which Stein was present, defendant Stein pointed out Waterbury as the driver of the truck.[5] On cross-examination,

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[4] The defense argued that Waterbury's recollection was inaccurate and that he had only 25% vision in one eye.

[5] The defense says that this constitutes a coerced confession—Stein having made the statement in police custody. It was not a confession of guilt but an admission of a specific fact. Although New York may impose the same requirements for admissibility on an admission as it does on a confession, see *People* v. *Reilly*, 181 App. Div. 522, 528, 169 N. Y. S. 110, 123, aff'd, 224 N. Y. 90, 120 N. E. 113,

he recounted that he had picked Wissner out of a lineup at Hawthorne Barracks on June 8 and identified him as the killer.[6]

Jeppeson testified that the rental truck had been let to Cooper on April 3 and on three previous occasions, Cooper having in each case used an alias and a false license as before stated, and having given his occupation as "bookseller." He also testified as to his conversation with Cooper on the morning of the latter's arrest.

Dorfman, in substance, testified that he and Wissner were partners in an auto rental business on the lower East Side of New York City. Cooper and Stein had approached them about six weeks before April 3 with the suggestion that they collaborate on a robbery at the Reader's Digest. The truck used in the killing had been rented by Cooper on April 3 and on three previous occasions when the conspirators had driven to Pleasantville to "case" the area and determine whether conditions were favorable for success in the crime. At these times, and one other, they also brought to Pleasantville an auto

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such utterances are not usually subject to the same restrictions on admissibility as are confessions. See 3 Wigmore on Evidence (3d ed.) § 821 (3). In the face of the weight of authority to the contrary, it cannot be said that any such requirement is imposed by the Fourteenth Amendment. Even if this admission were subject to the same reliability tests as confessions, there is no evidence that Stein was under any coercion thirty hours after his confession of June 7.

[6] The defense points out that: Waterbury went through the lineup two or three times before identifying Wissner; the lineup consisted of Wissner and several state troopers, each of whom was several inches taller than Wissner; two ladies who had seen a man who might have been the killer lurking in the vicinity of the Reader's Digest on April 3 also went through the lineup, and each of them identified as that man one of the state troopers in the lineup who was in Long Island on the day of the murder. The facts show that the lineup was not so constructed as to suggest Wissner as the man to be identified.

owned by the Dorfman-Wissner agency. On April 3, the four set out for Pleasantville with the truck, the car, and a tan valise containing three guns owned by Wissner. They left the car about a mile from the Reader's Digest and all got in the rented truck. The guns were distributed, Dorfman getting a black automatic and Wissner a nickel-plated revolver. The holdup proceeded in the manner described by Waterbury. Dorfman heard a shot during the holdup, but did not see who fired it. On the way back, however, Wissner expressed regret at the necessity of shooting the guard. The defendants threw away their guns, left the Reader's Digest truck, with Waterbury tied up inside, on a side road and left the rental truck at the place where the car had been parked during the commission of the crime. They drove back toward New York in the car. When they got to the Bronx, they parked the car and went on by subway and taxicab to Dorfman's apartment in Brooklyn, where they divided up the proceeds and separated. Subsequently, Dorfman and one Homishak went up to the Bronx and picked up the car.

Under New York law, Dorfman's testimony, since he was an accomplice, required corroboration.[7] It was afforded in the following ways: (1) Mrs. Dorfman testified that Cooper, Stein and Wissner had come to her apartment with her husband on the evening of April 3 and that they carried with them the tan valise which Dorfman had identified as that used in the robbery. It was established by police testimony that this valise had been found in June in Dorfman's apartment and when searched was found to contain a fragment of paper from an order form used by the Reader's Digest in April of

[7] N. Y. Code Crim. Proc., § 399. *People* v. *Goldstein*, 285 N. Y. 376, 34 N. E. 2d 362.

1950—an order form to which subscribers frequently attached cash in such manner that on removal of the cash a portion of the order form would come with it. (2) Police testified that Dorfman's automatic was found near the area where he said that he had thrown it away on April 3. (3) It was established that Petrini was killed by a bullet from a .38 revolver. (4) Homishak testified that he saw Dorfman in the company of the three petitioners on April 3 [8] and that he accompanied Dorfman to the Bronx to pick up the car that night. (5) An employee of the Reader's Digest at Pleasantville testified that he had seen the Spring Rental truck on the premises on April 3 and on one prior occasion. (6) Jeppeson's testimony substantiated Dorfman's story about rental of the truck.[9] (7) It was established that Cooper had absented himself from his job on April 3. (8) Waterbury's testimony about the events of April 3 and identification of Stein and Wissner checked with Dorfman's story. (9) The two confessions, if accepted by the jury, also were corroborative of the accomplice Dorfman in many details.

The defendants made no attempt to contradict or explain away any of this damaging testimony. Cooper's counsel, during a colloquy with the court, admitted that Cooper had rented the truck involved on April 3 and offered no explanation as to how this fact could be consistent with his client's claim of innocence. An effort

[8] There is conflict between the testimony of Homishak and Dorfman, the former placing the four conspirators on April 3 at a place different from that where Dorfman says they were.

[9] Jeppeson stated that the truck was rented in each case on a Saturday and returned on two occasions early Monday morning, which contradicts Dorfman's testimony that each junket to Pleasantville had been on a Monday morning. Jeppeson was testifying from recollection, unaided by record.

was made on summation to convince the jury that Dorfman, who did not have a prior criminal record, was the killer and had accused these other three, with his wife's cooperation, in order to save his own life. The tenor of the defense appears from Cooper's counsel on summation:

> "I don't care whether Cooper is innocent or guilty, that is insignificant in the solution of the fundamental problem as to whether the state troopers and other enforcing authorities themselves have violated far more fundamental principles. . . .
>
> ". . . Don't narrow yourselves into a mere solution of a petty murder . . . . Of course, we want a solution to that, but that is secondary, if the solution of that means that you are going to weaken the very foundations of the republic; then you would be unfit to be jurors."

Wissner's counsel devoted about half of his summation to arguing that the murder was not "premeditated"—a point without legal significance in felony murder under New York law.

II. Facts About the Confessions.

Against this background, we come to the controversy over the confessions. Uncontroverted evidence establishes the following:

Cooper.—Cooper, who made the first and most crucial confession, was arrested by the state police at 9 o'clock on Monday morning, June 5, under circumstances previously described. His father, who was with him at the time, also was arrested. Both were taken to a police station in New York City, where they were held (but not booked) until early in the afternoon. Thence, they were taken to state police headquarters at Hawthorne, in Westchester County, the county of the offense, arriving at about 2 o'clock.

At Hawthorne, the Coopers were separated; the father was detained in the police barracks and the son was taken to an office across the courtyard, known as the Bureau of Identification room, where Cooper's interrogation and his ultimate confession took place.

Although Cooper was continuously under guard and handcuffed, no one questioned him until 8 p. m., at which time three officers interrogated him for four or five hours. During this period, Cooper was confronted with his former prison mate, Brassett. However, he did not confess. Questioning was resumed the following day (Tuesday) at 10 a. m. and continued until 6 p. m., the same three officers participating. Just after 6 p. m. Cooper began to discuss confessing. At this time his father was being held at Hawthorne; his brother Morris had been arrested in New York, where his mere presence violated terms of his parole and rendered him subject to disciplinary action. Cooper first obtained a commitment by the police that his father would be released if he confessed. He then asked to see an official of the Parole Board in order to obtain assurance that, if he confessed, his brother Morris would not be prosecuted for parole violation. Accordingly, about 8 p. m. Reardon, an employee of the Parole Board, came to see Cooper, but the latter was not satisfied with his interview. Reardon's superior, Parole Commissioner Donovan, was sent for. Donovan arrived at about 10 p. m. and gave Cooper satisfactory assurance that Morris would be unmolested if Cooper "co-operated." Cooper then confessed orally to Reardon and Donovan. Thus the confession was first imparted, not to the police who are charged with brutality, but to visiting parole officials not so accused and called in at his own request. Thereupon, a typewritten confession was prepared which Cooper signed after making certain corrections, at about 1:30 or 2 on the morning of the 7th. It is twelve pages long, in great detail; it is

corroborated throughout by other evidence, and its general character is such that it could have been fabricated only by a person gifted with extraordinarily creative imagination.

Stein.—Stein was arrested at his brother's home at 2 a. m. on the morning of the 6th, before Cooper confessed. He was taken immediately to Hawthorne Barracks and confined in a room in the basement. The following morning, Captain Glasheen, commandant at the barracks, questioned him for an hour. After lunch questioning was resumed, with another officer joining in the questioning, and continued for two or three hours. That evening, Captain Glasheen returned and interrogated Stein from 7 p. m. until 2 a. m., with no result. At 2 a. m., Stein was informed about Cooper's confession and left with the advice to "sleep on it." The following morning, Stein was ready to confess. By afternoon, a statement had been prepared, corrected and signed. This seven-page statement, like Cooper's, was so complete and detailed and so dovetailed with the extrinsic evidence that, if it were not true, its author was possessed of amazing powers of divination.

The following day, Stein went to Pleasantville with two officers and explained on the ground how the crime had been committed.

Wissner.—Wissner was arrested about 9 a. m. on June 7—subsequent to Cooper's confession, which implicated him—and taken to Hawthorne, where he remained until his arraignment. He made no confession.

There is no direct testimony that petitioners were subjected to physical violence or the threat of it during their detention.[10] None of the defendants took the wit-

[10] The defense sought, unsuccessfully, to introduce an affidavit submitted on a prior motion by Stein's counsel which, according to Stein's brief here, set forth an account which counsel received from

ness stand to substantiate their claims. With one exception, every police officer who had contact with Cooper or Stein during detention was or could have been questioned about it by the defense. The exception came into contact with Stein only and was not shown to have been with him except in the presence of others who were witnesses. Thus, police testimony was consistent and unshaken that no violence or threats were used, that the accused were given food at mealtimes and, with the exceptions we have stated, were allowed to sleep at night.

The defendants' contentions as to physical violence rest entirely on circumstantial evidence. They would be utterly without support except for inferences, which they urge, from the admitted fact that when first physically examined, the day after arraignment, they showed certain bruises and injuries which *could* have been sustained from violent "third-degree" methods. On the morning of June 9, they were examined by the prison physician. Cooper had been in custody at the barracks between three and four days, Stein three days and Wissner two days.

Testimony by the prison doctor who examined them predicated mainly on the notes he made at that time was that Wissner had a broken rib and various bruises and

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Stein concerning police brutality. (This affidavit, though marked for identification, was not made part of the record here.) During oral argument on trial, counsel for defendants made many allusions as to violent conduct on the part of the police; and petitioner Cooper made an outburst accusing a police witness of lying, but did not become his own witness. Other than this, defendants took no action to establish their contentions. Prior to the trial, the defendants brought a proceeding in the Supreme Court of Westchester County to have the two confessions suppressed on the ground that they were illegally obtained. The prosecution denied the allegations of police misconduct which the defendants advanced in support of this motion and, in view of the conflict in the evidence, determination of the admissibility of the confessions was postponed until the trial.

abrasions on the side, legs, stomach and buttocks; Cooper had bruises on the chest, stomach, right arm, and both buttocks; Stein had a bruise on his right arm. Counsel for the petitioners, who examined them on the 9th and 10th of June, testified that the injuries sustained by each were more extensive than those described in the doctor's testimony.

The record stands that the injuries were of such nature that they might have been received prior to arrest;[11] indeed, one of the petitioners—Wissner, who exhibited perhaps the worst of the injuries but never confessed—was undergoing treatment at the time he was arrested.[12]

III. Constitutionality of Procedures Employed Below.

In the setting of these facts, the constitutional issues raised by petitioners involve procedural features not heretofore adjudicated by this Court. In view of the uncontradicted direct as well as circumstantial evidence against the defendants, the part, if any, played by the confessions in the conviction is uncertain. The jury was instructed to consider the confessions only if it found them to have been voluntary. It rendered a general verdict of guilty.

Under these circumstances, we cannot be sure whether the jury found the defendants guilty by accepting and relying, at least in part, upon the confessions or whether it rejected the confessions and found them guilty on the other evidence. Indeed, except as we rely upon a presumption that the jurors followed instructions, we cannot

[11] Dr. Vosburgh, the physician who had examined petitioners on June 9, testified that it was difficult to state exactly how long the bruises had been there; that the bruises on Cooper's body could have been as much as six days old (he had been in custody three days); and that Stein's bruises could have been sustained prior to arrest.

[12] This evidence was hearsay, but was not objected to by the defendants.

know that some jurors may not have acted upon one basis, while some convicted on the other. Also, since the Court of Appeals affirmed without opinion, we are not certain whether it did so on the ground that the confessions were properly relied on or that even without them the verdict was adequately supported.[13]

The New York procedures in this case therefore must be examined, not only as to their own constitutionality, but as to their consequences if valid, and the weight to be given to conclusions so reached.

The ideal of fair procedure was self-imposed by New York long before it was imposed upon her. New York's Constitution has enjoined observance of due process of law at least since 1821,[14] and statute law has provided for exclusion from evidence of coerced confessions since 1881.[15] The Court of Appeals is charged by the State with ultimate authority in such a case as this to adjudge and redress violations of that mandate.

Their appeal, taken as matter of right, afforded petitioners a review with a latitude much wider than is permitted to us. That court, in a death case, is empowered by statute to order a new trial for errors of law, or if the

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[13] A prior decision of the Court of Appeals indicates that it will reverse whenever a coerced confession appears in evidence, regardless of the other evidence. See *People* v. *Leyra*, 302 N. Y. 353, 364, 98 N. E. 2d 553, 559. However, it appears probable that the court there was applying a doctrine, not of New York law, but one which it considered to be imposed by this Court and the Fourteenth Amendment. The New York rule does not appear to us to be free from doubt. See *People* v. *Fisher*, 249 N. Y. 419, 426, 164 N. E. 336, 338; *People* v. *Samuels*, 302 N. Y. 163, 173, 96 N. E. 2d 757, 762; *People* v. *Leyra*, 304 N. Y. 468, 108 N. E. 2d 673.

[14] N. Y. Const., Art. I, § 6.

[15] N. Y. Code Crim. Proc., § 395. Prior to 1881, coerced confessions were excluded under common-law doctrines of evidence. See *People* v. *Mondon*, 103 N. Y. 211, 8 N. E. 496; *People* v. *McMahon*, 15 N. Y. 384.

conviction is found to be "against the weight of evidence," or if the court is satisfied for any reason whatever "that justice requires a new trial." [16] Even where it finds that the jury could "reasonably credit the denial of the police," if it considers that the prosecution had failed to produce all reasonably available evidence to clear charges of coercion, it will order "a new trial where there can be a more adequate search for the truth." *People* v. *Mummiani*, 258 N. Y. 394, 401, 403, 180 N. E. 94, 97, 98.

Although, even within this range, the Court of Appeals found no cause for upsetting this conviction, our review penetrates its judgment and searches the record in the trial court.

The procedure adopted by New York for excluding coerced confessions relies heavily on the jury. It requires a preliminary hearing as to admissibility, but does not permit the judge to make a final determination that a confession is admissible. He may—indeed, must—exclude any confession if he is convinced that it was *not* freely made or that a verdict that it was so made would be against the weight of evidence. But, while he may thus cast the die against the prosecution, he cannot do so against the accused. If the voluntariness issue presents a fair question of fact, he must receive the confession and leave to the jury, under proper instructions, the ultimate determination of its voluntary character and also its truthfulness. *People* v. *Weiner*, 248 N. Y. 118, 161 N. E. 441. The judge is not required to exclude the jury while he hears evidence as to voluntariness, *People* v. *Brasch*, 193 N. Y. 46, 85 N. E. 809, and perhaps is not permitted to do so, *People* v. *Randazzio*, 194 N. Y. 147, 159, 87 N. E. 112, 117.

The trial court held a preliminary hearing as to admissibility of these confessions before the jury. No de-

[16] N. Y. Code Crim. Proc., § 528.

fendant objected or requested a hearing with the jury absent. The court advised counsel for each defendant that he might cross-examine all witnesses called by the State and offer any on his own behalf, and both privileges were exercised. The judge ruled that a question of fact resulted, which he submitted under instructions which authorized the jury to find the confessions coerced not only because of "force and intimidation and fear" but also for any "implied coercion because of the manner in which they [the confessors] were kept in custody," and on both grounds the burden to prove beyond reasonable doubt was placed upon the State.[17]

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[17] The jury were instructed as follows:

"Ladies and gentlemen, there have been received in evidence statements alleged to have been made by the defendant Calman Cooper and the defendant Harry A. Stein. It is the contention of the People that these statements are in the nature of confessions and that they were made freely and voluntarily. On the other hand, it is the contention made on behalf of the defendant Calman Cooper and on behalf of the defendant Harry A. Stein that these alleged confessions are valueless as evidence against either of them, because it is contended on behalf of each of these defendants that these statements were made because of force and intimidation and fear visited upon each of them by certain members of the state police and implied coercion because of the manner in which they were kept in custody from the time of apprehension until the alleged confessions were made. You must find beyond a reasonable doubt that these confessions, or either of them, was a voluntary one before you would have a right to consider either of them.

"I charge you that the law of this State with respect to a confession is this, that a confession made by a defendant, whether in the course of a judicial proceeding or to a private person, can be given in evidence against him unless made under the influence of fear produced by threats . . . ."

The judge further instructed them that if they found that the confessions were voluntary they were then to consider whether their contents, or any part of them, were true.

The jury also was instructed that they should not consider a state-

New York procedure does not leave the outcome finally to the caprice of a lay jury, unfamiliar with the techniques of trial practice. The trial judge, too, has a heavy responsibility resulting from broad powers to set aside a verdict if he thinks the evidence does not warrant it.[18] Petitioners submitted such a motion, which the judge denied, thus adding the weight of his own approval to the jury verdict.

An attack on the fairness of New York procedure is that petitioners could not take the witness stand to support, with their own oaths, the charges their counsel made against the state police without becoming subject to general cross-examination. State law on the subject is disputed and uncertain. It is clear that the Court of Appeals would not have held it error had such witnesses been subjected to general cross-examination.[19] Respondents, however, contend, and petitioners deny, that it is the practice of trial courts to limit cross-examination under these circumstances, and each cites records of prosecutions to confirm its position.

It is not impossible that cross-examination could be employed so as to work a denial of due process. But no basis is laid for such a contention here. Appellate courts

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ment by one defendant as any evidence of guilt against any other defendant.

These portions of the court's charge were not objected to.

For the first time, the petitioners here claim that this charge set forth the requirements for voluntariness under state law, but did not set forth the requirements for voluntariness under the Fourteenth Amendment. They construe the court's charge as instructing the jury that "implied coercion" does not make a confession involuntary. We do not agree with their construction of the charge, and the fact that no objection was made to it indicates that they did not so construe it at the time it was made. In any event, failure to object made the matter unavailable here.

[18] N. Y. Code Crim. Proc., § 465.

[19] See *People* v. *Trybus*, 219 N. Y. 18, 113 N. E. 538.

leave an exceptional discretion to trial courts to prevent abuse and injustice. But here the defendants took no step which would call for or permit an exercise of such discretion. They made no request for a ruling by the trial court and made no offer or suggestion of readiness to testify, however restricted the cross-examination might be.[30] We do not know whether, or how far, the court would have permitted any line of cross-examination, nor what specific limitation defendants would have claimed. We will not adjudge a trial court guilty of constructive abuse by imputing to it a ruling that never was made on a proposition that never was put to it.

Petitioners' attack is so unbounded and unqualified that it could prevail only if the Fourteenth Amendment were construed to allow them to testify to their coercion by the police, shielded from any cross-examination whatever. If they had given such testimony, it would have been in direct conflict with that of the police, and the decision would depend on which was believable. Certainly the Constitution does not prohibit tests of credibility which American law uniformly applies to witnesses. If in open court, free from violence or threat of it, defendants had been obliged to admit incriminating facts, it might bear on the credibility of their claim that the same facts were admitted to the police only in response to beating. And if they became

[30] As was done, without success, in *Witt* v. *United States*, 196 F. 2d 285. In *Witt*, the defendant had testified in the absence of the jury—as he could under federal procedure—as to the voluntariness of a confession. After the court had determined that it was admissible, the defendant sought to testify further on the same subject in the presence of the jury, but requested an order in advance from the court that if he did so cross-examination would be restricted to what had been said on direct. The court refused to so order, and defendant refrained from taking the stand. See also *Raffel* v. *United States*, 271 U. S. 494, 497.

witnesses, does the Constitution compel the State to forego attack on their credibility by showing former convictions? We now know that each had an impressive felony record, one including murder and another perjury.[21] Doubtless, to have testified would have resulted in disclosing this to the jury, while silence would keep it from being brought to light until after the verdict. We think, on any realistic view of this case, they stayed off the stand not because the State would subject them to any improper cross-examination but because their records made them vulnerable to any proper one.

The State did not seek to draw any inference adverse to defendants from their choice of silence, cf. *Adamson* v. *California*, 332 U. S. 46, beyond the obvious fact that their confessions have not been repudiated, their charge of police violence is left without testimonial support, and

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[21] Petitioners' prior convictions were as follows:

COOPER

1928	Waycross, Ga.	Auto theft	Probation	2 years.
1930	Norfolk, Va.	Auto theft	Atlanta	3 years.
1934	Brooklyn, N. Y.	Attempted grand larceny.		3 years (suspended).
1934	Brooklyn, N. Y.	Murder	Sing Sing	20 years to life.
1948	U. S. Court, N. Y. C.	Dyer Act	Lewisburg	3 years.

STEIN

1918	New York	Grand larceny		Sentence suspended.
1918	New York	Petty larceny		Sentence suspended.
1921	Bronx, N. Y.	Robbery	Sing Sing	10 years.
1931	New York	Robbery	Sing Sing	25 years.
1933	U. S. Court, N. Y. C.	Perjury	Lewisburg	2 years.

WISSNER

1928	Brooklyn, N. Y.	Attempted robbery	Reform School, Elmira, N. Y.	
1934	Westchester Co.	Robbery	Sing Sing	15 years.

the police account of the confessions is undenied. In trial of a coercion issue, as of every other issue, when the prosecution has made a case to go to the jury, an accused must choose between the disadvantage from silence and that from testifying. The Constitution safeguards the right of a defendant to remain silent; it does not assure him that he may remain silent and still enjoy the advantages that might have resulted from testifying. We cannot say that petitioners have been denied a fair hearing of the coercion charge.

Petitioners suffer a disadvantage inseparable from the issues they raise in that this procedure does not produce any definite, open and separate decision of the confession issue. Being cloaked by the general verdict, petitioners do not know what result they really are attacking here. For all we know, the confession issue may have been decided in their favor. The jury may have agreed that the confessions were coerced, or at least that the State had not met the burden of proving beyond a reasonable doubt that they were voluntary. If the method of submission is, as we believe, constitutional, it leaves us to review hypothetical alternatives.

This method of trying the coercion issue to a jury is not informative as to its disposition. Sometimes the record permits a guess or inference, but where other evidence of guilt is strong a reviewing court cannot learn whether the final result was to receive or to reject the confessions as evidence of guilt. Perhaps a more serious, practical cause of dissatisfaction is the absence of any assurance that the confessions did not serve as makeweights in a compromise verdict, some jurors accepting the confessions to overcome lingering doubt of guilt, others rejecting them but finding their doubts satisfied by other evidence, and yet others or perhaps all never reaching a separate and definite conclusion as to the confessions but returning an unanalytical and impressionistic verdict

based on all they had heard. Courts uniformly disapprove compromise verdicts but are without other means than admonitions to ascertain or control the practice. Defendants, when two or more issues are submitted, are entitled to instructions appropriate to discountenance, discourage and forbid such practice. However, no question is raised in this respect as to the charge in this case.

In civil cases, certainty and exposure of the process is sometimes sought by the special verdict or by submission of interrogatories. *E. g.*, Fed. Rules Civ. Proc., 49. But no general practice of these techniques has developed in American criminal procedure. Our own Rules of Criminal Procedure make no provision for anything but a general verdict. Indeed, departure from this has sometimes been resisted as an impairment of the right to trial by jury, see *People* v. *Tessmer*, 171 Mich. 522, 137 N. W. 214; *State* v. *Boggs*, 87 W. Va. 738, 106 S. E. 47, which usually implies one simple general verdict that convicts or frees the accused.

Nor have the courts favored any public or private post-trial inquisition of jurors as to how they reasoned, lest it operate to intimidate, beset and harass them. This Court will not accept their own disclosure of forbidden quotient verdicts in damage cases. *McDonald* v. *Pless*, 238 U. S. 264. Nor of compromise in a criminal case whereby some jurors exchanged their convictions on one issue in return for concession by other jurors on another issue. *Hyde* v. *United States*, 225 U. S. 347. "If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference." *McDonald* v. *Pless*, *supra*, at 267–268.

But this inability of a reviewing court to see what the jury has really done is inherent in jury trial of any two or more issues, and departure from instruction is a risk

inseparable from jury secrecy and independence. The uncertainty, while the cause of concern and dissatisfaction in the literature of the profession, does not render the customary jury practice unconstitutional.

The Fourteenth Amendment does not forbid jury trial of the issue. The states are free to allocate functions as between judge and jury as they see fit. Cf. *Walker* v. *Sauvinet*, 92 U. S. 90; *Minneapolis & St. L. R. Co.* v. *Bombolis*, 241 U. S. 211. Many states emulate the New York practice,[22] while others hold that presence of the jury during preliminary hearing is not error.[23] Despite the difficult problems raised by such jury trial, we will not strike down as unconstitutional procedures so long established and widely approved by state judiciaries, regardless of our personal opinion as to their wisdom.

We have, therefore, to consider the constitutional effect of both alternatives left to the jury by the court's instruction, assuming it to have followed one or the other. They involve very different considerations and are best discussed separately.

IV. Was it Unconstitutional if These Confessions Were Used as the Basis of Conviction?

Since these convictions may rest in whole or in part upon the confessions, we must consider whether they are a constitutionally permissible foundation for a finding of guilt.

Inquiries on which this Court must be satisfied are: (1) Under what circumstances were the confessions obtained? (2) Has the use of the confessions been repugnant to "that fundamental fairness essential to the very concept of justice"? *Lisenba* v. *California*, 314 U. S. 219,

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[22] See cases cited in 3 Wigmore on Evidence (3d ed.) § 861.

[23] See Annotation in 148 A. L. R. 546. Cf. *United States* v. *Carignan*, 342 U. S. 36, 38, for the rule in federal courts.

236. The first is identical with that litigated before the trial court and jury. The second is within, if not identical with, those questions considered by the state appellate court. As to both questions, we have the identical evidence that was before both state courts. At the threshold of our inquiry, therefore, lies the question: What, if any, weight do we give to the verdict of the jury, the rulings of the trial judge and the determination of the state appellate court?

Petitioners' argument here essentially is that the conclusions of the New York judges and jurors are mistaken and that by reweighing the same evidence we, as a superjury, should find that the confessions were coerced. This misapprehends our function and scope of review, a misconception which may be shared by some state courts with the result that they feel a diminished sense of responsibility for protecting defendants in confession cases.[24]

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[24] The Texas Court of Criminal Appeals in *Newman* v. *State*, 148 Tex. Cr. R. 645, 651–652, 187 S. W. 2d 559, 562–563, said:

"The voluntary or involuntary character of a confession is determined by a conclusion as to whether the accused at the time he confesses is in possession of mental freedom to confess or to deny a suspected participation in a crime and to determine which the Supreme Court of the United States will itself make an independent examination of the facts and, from that examination, reach a conclusion based upon what it finds to be the conceded and uncontroverted facts.

". . . [T]here is no escape from the conclusion that the Supreme Court of the United States has potential jurisdiction in all State cases where it is claimed by the accused that the conviction was based upon his involuntary confession.

"Such being true, the position this Court occupies in relation to such cases is both unique and difficult—unique, in that by the Constitution and the laws of this State (Const. Art. 5, sec. 5; Art. 812, C. C. P.) we are the court of last resort in criminal cases. If we reach a conclusion that the confession was involuntary, such

Of course, this Court cannot allow itself to be completely bound by state court determination of any issue essential to decision of a claim of federal right, else federal law could be frustrated by distorted fact finding. But that does not mean that we give no weight to the decision below, or approach the record *de novo* or with the latitude of choice open to some state appellate courts, such as the New York Court of Appeals. Mr. Justice Brandeis, for this Court, long ago warned that the Fourteenth Amendment does not, in guaranteeing due process, assure immunity from judicial error. *Milwaukee Electric Railway & Light Co.* v. *Milwaukee,* 252 U. S. 100, 106. It is only miscarriages of such gravity and magnitude that they cannot be expected to happen in an enlightened system of justice, or be tolerated by it if they do, that cause us to intervene to review, in the name of the Federal Constitution, the weight of conflicting evidence to support a decision by a state court.

It is common courtroom knowledge that extortion of confessions by "third-degree" methods is charged falsely as well as denied falsely. The practical problem is to separate the true from the false. Primary, and in most cases final, responsibility for determining contested facts rests, and must rest, upon state trial and appellate courts.

A jury and the trial judge—knowing local conditions, close to the scene of events, hearing and observing the witnesses and parties—have the same undeniable advantages over any appellate tribunal in determining the charge of coercion of a confession as in determining the

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conclusion is binding upon the State and society, for under our Constitution (Art. 5, sec. 26) the State is expressly denied the right of appeal in a criminal case and is therefore barred from seeking a review of that conclusion by the Supreme Court. On the other hand, if we conclude that the confession was voluntary, such conclusion is in no sense final, binding the accused only until reviewed by the Supreme Court of the United States."

main charge of guilt of the crime. When the issue has been fairly tried and reviewed, and there is no indication that constitutional standards of judgment have been disregarded, we will accord to the state's own decision great and, in the absence of impeachment by conceded facts, decisive respect. *Gallegos* v. *Nebraska*, 342 U. S. 55, 60; *Lyons* v. *Oklahoma*, 322 U. S. 596, 602–603; *Lisenba* v. *California*, 314 U. S. 219.

Accordingly, we accept this verdict and judgment as a permissible resolution of contradictions in evidence or conflicting inferences unless, as is urged, undisputed facts indicate use of incorrect constitutional standards of judgment. This may best be determined by separate examination of the following conclusions, implicit in the judgments below: (1) that these confessions were not extorted by physical coercion; (2) that these confessions were not extorted by methods which, though short of physical coercion, were so oppressive as to render the confessions inadmissible; and (3) that admitted illegal detention of petitioners at the time of the confessions did not render them inadmissible.

1. *Physical violence.*—Physical violence or threat of it by the custodian of a prisoner during detention serves no lawful purpose, invalidates confessions that otherwise would be convincing, and is universally condemned by the law. When present, there is no need to weigh or measure its effects on the will of the individual victim. The tendency of the innocent, as well as the guilty, to risk remote results of a false confession rather than suffer immediate pain is so strong that judges long ago found it necessary to guard against miscarriages of justice by treating any confession made concurrently with torture or threat of brutality as too untrustworthy to be received as evidence of guilt.

Admitted injuries and bruises on defendants' bodies after arraignment were mute but unanswerable witnesses

that their persons recently had been subjected to violence from some source. Slight evidence, even interested testimony, that it occurred during the period of detention or at the hands of the police, or failure by the prosecution to meet the charge with all reasonably available evidence, might well have tipped the scales of decision below.[25] Even here, it would have force if there were any evidence whatever to connect the admitted injuries with the events or period of interrogation. But there is no such word in the record.

On the contrary, we have positive testimony of the police, not materially inconsistent or inherently improbable, unshaken on cross-examination. The only expert testimony on the subject is undisputed and is that the injuries may have been sustained before arrest. This becomes more than a possibility when we consider that neither defendants nor anyone else tells us what defendants were up to in the period just prior to arrest. We are not convinced from their criminal records and way of life as now known to us, though not to the jury, that their free days or nights were secure from violence. This, with the whole evidence concerning the confessions, leaves us no basis for throwing out the decisions of the courts below, unless we simply prefer the unsworn claims of defendants' counsel against the evidence.

As to the inferences to be drawn from unexplained injuries, under these circumstances, we should defer to the advantages of trial judge and jury. For seven weeks they observed the day-to-day demeanor of defendants, their attitudes and reactions; all the knowledge we have of their personalities is still photographs of two of them. The trial judge and jury also for long periods could observe the police officers whose conduct was in question, knew not only what they answered but how they an-

[25] See *People* v. *Barbato*, 254 N. Y. 170, 172 N. E. 458.

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swered, could form some opinions of their attitudes—of the personal characteristics which never can get into a printed record but which make for belief or unbelief that they were guilty of cruelty and violence.

We determine that the state court could properly find that the confessions were not obtained by physical force or threats.

2. *Psychological coercion.*—Psychological coercion is claimed as a secondary contention. It is urged that admitted facts show psychological pressure by interrogation, such as to overpower these petitioners' mental resistance and induce involuntary confessions. Of course, a process of interrogation can be so prolonged and unremitting, especially when accompanied by deprivation of refreshment, rest or relief, as to accomplish extortion of an involuntary confession.

But the inquiry as to such allegations has a different point of departure. Interrogation is not inherently coercive, as is physical violence. Interrogation does have social value in solving crime, as physical force does not. By their own answers many suspects clear themselves, and the information they give frequently points out another who is guilty. Indeed, interrogation of those who know something about the facts is the chief means to solution of crime. The duty to disclose knowledge of crime rests upon all citizens. It is so vital that one known to be innocent may be detained, in the absence of bail, as a material witness.[26] This Court never has held that the Fourteenth Amendment prohibits a state from such detention and interrogation of a suspect as under the circumstances appears reasonable and not coercive.

Of course, such inquiries have limits. But the limits are not defined merely by calling an interrogation an "in-

[26] N. Y. Code Crim. Proc., § 618-b; cf. Fed. Rules Crim. Proc., 46 (b).

quisition," which adds to the problem only the emotions inherited from medieval experience. The limits in any case depend upon a weighing of the circumstances of pressure against the power of resistance of the person confessing. What would be overpowering to the weak of will or mind might be utterly ineffective against an experienced criminal.

Both Stein and Cooper confessed only after about twelve hours of intermittent questioning. In each case this was stretched out over a 32-hour period, with the suspect sleeping and eating in the interim. In the case of Cooper, a substantial part of this time he spent driving a bargain with the police and the parole officers. It also is true that the questioning was by a number of officers at a time and by different officers at different times. But we cannot say that the use of successive officers to question these petitioners for the periods of time indicated is so oppressive as to overwhelm powers of resistance. While we have reversed convictions founded on confessions secured through interrogations by "relays," [27] we have also sustained conviction when, under different circumstances, the relay technique was employed.[28] But we have never gone so far as to hold that the Fourteenth Amendment requires a one-to-one ratio between interrogators and prisoners, or that extensive questioning of a prisoner automatically makes the evidence he gives in response constitutionally prohibited.

The inward consciousness of having committed a murder and a robbery and of being confronted with evidence of guilt which they could neither deny nor explain seems enough to account for the confessions here. These men were not young, soft, ignorant or timid. They were not

[27] *Malinski* v. *New York*, 324 U. S. 401; *Watts* v. *Indiana*, 338 U. S. 49; *Turner* v. *Pennsylvania*, 338 U. S. 62; *Harris* v. *South Carolina*, 338 U. S. 68; *Ashcraft* v. *Tennessee*, 322 U. S. 143.

[28] *Lisenba* v. *California*, *supra*, at 229, 239.

inexperienced in the ways of crime or its detection, nor were they dumb as to their rights. At the very end of his interrogation, the spectacle of Cooper naming his own terms for confession, deciding for himself with whom he would negotiate, getting what he wanted as a consideration for telling what he knew, reduces to absurdity his present claim that he was coerced into confession. Of course, these confessions were not voluntary in the sense that petitioners wanted to make them or that they were completely spontaneous, like a confession to a priest, a lawyer, or a psychiatrist. But in this sense no criminal confession is voluntary.

Cooper's and Stein's confessions obviously came when they were convinced that their dance was over and the time had come to pay the fiddler. Even then, Cooper was so far in control of himself and the situation as to dictate the *quid pro quo* for which he would confess. That confession came at a time when he must have known that the police already knew enough, from Jeppeson and Brassett, to make his implication inevitable. Stein held out until after Cooper had confessed and implicated him.[29] Both confessions were "voluntary," in the only sense in which confessions to the police by one under arrest and suspicion ever are. The state courts could properly find an absence of psychological coercion.

3. *Illegal detention.*—Illegal detention alone is said to void these confessions. All three of the prisoners were held incommunicado at the barracks until the evening of June 8, when they were taken before a nearby magistrate and arraigned. This delay in arraignment was held by the trial judge to be unreasonable as a matter

[29] An officer testified that, subsequent to his confession, "He [Stein] said 'That rotten — — — — Cooper, it is hard to believe he would put me in the way he did; he put me right into the . . .' [continuing]—into the seat; I was the best friend he ever had; well, if I must go, I will take him with me."

of law and a violation of the statutes of the State of New York.[30] However, such delay does not make a confession secured during such period of illegal detention necessarily inadmissible as a matter of New York law.[31]

To delay arraignment, meanwhile holding the suspect incommunicado, facilitates and usually accompanies use of "third-degree" methods. Therefore, we regard such occurrences as relevant circumstantial evidence in the inquiry as to physical or psychological coercion. As such, it was received and the jury was instructed to consider it in this case. But the petitioners' contention here goes farther—it is that the delayed arraignment compelled the rejection of the confessions.

Petitioners confuse the more rigid rule of exclusion which, in the exercise of our supervisory power,[32] we have promulgated for federal courts with the more limited requirements of the Fourteenth Amendment.[33] This, we have held, did not impose rules of evidence on state courts which bind them to exclude a confession because, without

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[30] Under New York law, a defendant must be promptly taken before a magistrate. Code of Criminal Procedure, § 165, and failure to do so renders the arresting officer liable to criminal prosecution. N. Y. Penal Law, § 1844.

[31] Under New York law, the fact that a confession was given during a period of illegal detention is one factor to be considered in determining whether or not it was voluntary; but it does not make the confession inadmissible *per se*. *People* v. *Trybus*, 219 N. Y. 18, 113 N. E. 538; *People* v. *Mummiani*, 258 N. Y. 394, 180 N. E. 94.

[32] Admissibility in federal courts is governed by "principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." Fed. Rules Crim. Proc., 26.

[33] Compare *McNabb* v. *United States*, 318 U. S. 332, with *Stroble* v. *California*, 343 U. S. 181, 197; *Weeks* v. *United States*, 232 U. S. 383, with *Wolf* v. *Colorado*, 338 U. S. 25; *Nardone* v. *United States*, 302 U. S. 379, and *Weiss* v. *United States*, 308 U. S. 321, 329, with *Schwartz* v. *Texas*, 344 U. S. 199. See also *United States* v. *Carignan*, 342 U. S. 36.

coercion, it was obtained while a prisoner was uncounseled and illegally detained. *Stroble* v. *California*, 343 U. S. 181, 197; *Lisenba* v. *California*, 314 U. S. 219.

From the foregoing considerations, we conclude that if the jury resolved that the confessions were admissible as a basis for conviction it was not constitutional error.

V. If the Jury Rejected the Confessions, Could it Constitutionally Base a Conviction on Other Sufficient Evidence?

Petitioners raised this question by a request for instruction to the jury that if it found the confessions to have been coerced it must return a verdict of acquittal. This was refused. Their principal authority for the requested charge is *Malinski* v. *New York*, 324 U. S. 401, which was tried by the same procedure followed here. This Court reversed the conviction and the opinion of four Justices said of the confession found therein to have been coerced (p. 404): "And if it is introduced at the trial, the judgment of conviction will be set aside even though the evidence apart from the confession might have been sufficient to sustain the jury's verdict." Similar expressions are to be found in other cases.

It is hard to see why a jury should be allowed to return a verdict which cannot be allowed to stand. If having heard an illegally obtained confession prevents a legal verdict of guilty on other sufficient evidence, why permit return of one foredoomed to be illegal? The alternative, of course, is an acquittal, which is what petitioners asked.

The claim is far-reaching. There can be no jury trial of the coercion issue without bringing to the knowledge of the jurors the fact of confession and usually its contents. But American practice has evolved no technique for learning, through special verdict or otherwise, what part the knowledge plays in the result. Hence the dilemma of this case is always present, if not presented in

earlier cases. If this uncertainty invalidates any conviction or requires an acquittal, it is a grave matter, for most states, like New York, permit no prosecution after acquittal.[34] This would go far toward making it impracticable to submit the issue of coercion to the jury, a traditional practice assumed on the whole to be of advantage to the defense and an additional protection to the accused.

The claim also is novel. This Court never has decided that reception of a confession into evidence, even if we held it to be coerced, requires an acquittal or discharge of a defendant. On the contrary, this Court has returned all such cases for retrial, which we should not have done if obtaining and attempted use of a coerced confession were enough to require acquittal.

It is not deniable that apart from the *Malinski* statement there have been other similar utterances. *Lyons* v. *Oklahoma*, 322 U. S. 596, 597 (footnote); *Stroble* v. *California*, 343 U. S. 181, 190; *Gallegos* v. *Nebraska*, 342 U. S. 55, 63. It is clear, however, that these statements were *dicta* about a proposition not essential to the result, since in each instance those confessions were sustained and the convictions affirmed. And, of course, the present consequences were not asserted or argued at the bar nor anticipated or approved by anything appearing in the opinions.

Except in *Malinski*, the question presented here could not have been raised or decided. This Court's power to reverse such a conviction was first exerted in *Brown* v. *Mississippi*, 297 U. S. 278, in which the *only* evidence in the trial consisted of a confession admittedly secured through mob violence. The Court there reasoned that if the defendant's "trial" consisted solely of the introduction of such evidence, he had only a "mere pretense" of a trial; the actual trial had occurred during the extortion of the confession, and the subsequent pro-

[34] N. Y. Const., Art. I, § 6.

ceeding was only a formal ratification of the mob's action. Such a proceeding would be a violation of the Due Process Clause under even the most restricted view. In *Ashcraft* v. *Tennessee*, 322 U. S. 143, 145, and *Ward* v. *Texas*, 316 U. S. 547, we noted that without the confession there could be no conviction. And in *Lyons*, there was no credible evidence of guilt in the record except the confession; in the *Gallegos* case, it is noted that conviction without the confession "would logically have been impossible" (p. 60) and this Court therefore assumed that the jury found the statements voluntary.

Against this factual background, we do not think our cases establish that to submit a confession to a state jury for judgment of the coercion issue automatically disqualifies it from finding a conviction on other sufficient evidence, if it rejects the confession.[35] Here the evidence of

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[35] *Bram* v. *United States*, 168 U. S. 532, has been cited as authority, for the proposition that an inadmissible confession automatically requires reversal, because of this language (p. 541): "Having been offered as a confession and being admissible only because of that fact, a consideration of the measure of proof which resulted from it does not arise in determining its admissibility. If found to have been illegally admitted, reversible error will result, since the prosecution cannot on the one hand offer evidence to prove guilt, and which by the very offer is vouched for as tending to that end, and on the other hand for the purpose of avoiding the consequences of the error, caused by its wrongful admission, be heard to assert that the matter offered as a confession was not prejudicial because it did not tend to prove guilt." But the language, while superficially applicable to the question at hand, was addressed to no such problem in the *Bram* case. There the prosecution had introduced into evidence a conversation between an illegally held and uncounseled prisoner and a detective in which the prisoner stated, in reply to an allegation that one "X" had seen the prisoner commit a crime from his vantage point at a ship's wheel, that "he [X] could not see me from there." The Government took the position in the *Bram* case that this statement, even if not voluntary, was not a confession, since its author

guilt, consisting of direct testimony of the surviving victim, Waterbury, and the well-corroborated accomplice, Dorfman, as well as incriminating circumstances unexplained, is enough apart from the confessions so that it could not be held constitutionally or legally insufficient to warrant the jury verdict. Indeed, if the confessions had been omitted and the convictions rested on the other evidence alone, we would find no grounds to review, not to mention to reverse them.

We would have a different question if the procedure had been that which may have been in mind when some of our cases were written. Of course, where the judge makes a final determination that a confession is admissible and sends it to the jury as a part of the evidence to be considered on the issue of guilt and the ruling admit-

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purported to deny, not admit, guilt. The quoted language of the Court is the answer to this position. As the Court points out, the evidence was introduced on the theory that it tended to admit guilt, and only on that theory would it have been admissible. It therefore must be treated as a confession. The sentences immediately preceding the quoted language bring this out: "It is manifest that the sole ground upon which the proof of the conversation was tendered was that it was a confession, as this was the only conceivable hypothesis upon which it could have been legally admitted to the jury. It is also clear that in determining whether the proper foundation was laid for its admission, we are not concerned with how far the confession tended to prove guilt."

Thus, *Bram* merely decided that a confession otherwise erroneous could not be used merely because the defendant claimed that it did not incriminate him. This is precisely what this Court subsequently held in *White* v. *Texas*, 310 U. S. 530.

In any event, the *Bram* case was a federal case where we exercised supervisory power rather than merely enforced the Fourteenth Amendment. It is not a rock upon which to build constitutional doctrine. According to Wigmore (3d ed., Vol. 3, pp. 240–241, n. 2), this decision represents "the height of absurdity in misapplication of the law," and has been discredited by subsequent cases.

ting the confession is found on review to be erroneous, the conviction, at least normally, should fall with the confession.

But here the confessions are put before the jury only tentatively, subject to its judgment as to voluntariness and with binding instructions that they be rejected and ignored unless found beyond reasonable doubt to have been voluntary. By petitioners' hypothesis on this point, the jury itself rejected the confessions. The ample other evidence makes this a possible, if not very convincing, explanation of the verdict. By the very assumption, however, there has been no error, for the confessions finally were rejected as the free choice of the jury.

We could hold that such provisional and contingent presentation of the confessions precludes a verdict on the other sufficient evidence after they are rejected only if we deemed the Fourteenth Amendment to enact a rigid exclusionary rule of evidence rather than a guarantee against conviction on inherently untrustworthy evidence. We have refused to hold it to enact an exclusionary rule in the case of other illegally obtained evidence. *Wolf* v. *Colorado*, 338 U. S. 25; *Schwartz* v. *Texas*, 344 U. S. 199; *Snyder* v. *Massachusetts*, 291 U. S. 97. See *Adamson* v. *California*, 332 U. S. 46; *United States* v. *Carignan*, 342 U. S. 36. Coerced confessions are not more stained with illegality than other evidence obtained in violation of law. But reliance on a coerced confession vitiates a conviction because such a confession combines the persuasiveness of apparent conclusiveness with what judicial experience shows to be illusory and deceptive evidence. A forced confession is a false foundation for any conviction, while evidence obtained by illegal search and seizure, wire tapping, or larceny may be and often is of the utmost verity. Such police lawlessness therefore may not void state convictions while forced confessions will do so.

We find no error in refusing the instruction asked in this case.

But this does not exhaust petitioners' arsenal of objections. They argue that even if the jury were permitted to find the verdict, a reviewing court must set it aside. They say that affirmance without opinion may mean that, while the Court of Appeals thought the treatment of the confessions erroneous, it may have affirmed on the basis that, in view of other sufficient evidence, the error was harmless. The New York statute,[36] like the Federal Rules of Criminal Procedure,[37] commands reviewing courts to disregard errors and irregularities which do not affect substantial rights. That such a general legislative mandate is constitutional is not in question. If the general rule is not prohibited, the question in each case becomes one as to the propriety of its application to the evidence. In a trial such as this, lasting seven weeks, where objections by three defense counsel required in excess of three hundred rulings by the trial court without the long deliberation and debate possible for appellate court consideration, it would be a miracle if there were not some questions on which an appellate court would rule otherwise than did the trial judge. The harmless-error statutes have been adopted to give discretion to overlook errors which cannot be seen to do injustice.

But, whatever may have been the grounds of the Court of Appeals, we base our decision, not upon grounds that error has been harmless, but upon the ground that we find no constitutional error. We have pointed out that it was not error if the jury admitted and relied on the confession and was not error if they rejected it and convicted on

[36] N. Y. Code Crim. Proc., § 542.

[37] Fed. Rules Crim. Proc., 52 (a).

other evidence. To say that although there was no error in the trial an appellate court must reverse would require justification by more authority than we are able to discover.

VI. Wissner's Case.

Wissner's case is somewhat different and its disposition involves other considerations. Wissner never confessed, but he was implicated by those who did. His objections raise questions of admissibility of the confessions to which he was not a party.

However, we find as regards Wissner no constitutional error such as would justify our setting aside his conviction.

Our holding that it was permissible for the state courts to find that the confessions were voluntary takes away the support for Wissner's position here. But, even if the confessions were considered to have been involuntary, their use would not have violated any federal right of Wissner's. *Malinski* v. *New York*, 324 U. S. 401, 410–412. This Court there refused to reverse the conviction of Rudish, a codefendant of Malinski who had been named in the latter's confession. It is true that Rudish's name was there deleted and an "X" substituted in its place before the jury got the confession. Use of this device does not appear to have been controlling in the Court's decision and Mr. Justice Rutledge, dissenting, pointed out what no one questioned, that "The devices were so obvious as perhaps to emphasize the identity of those they purported to conceal." P. 430. On remand, the New York Court of Appeals on its own initiative ordered a new trial for Rudish as well as Malinski. 294 N. Y. 500, 63 N. E. 2d 77. Surely in the light of the other testimony such a deletion from the confessions here would not have diverted their incriminating statements from Wissner to an anonymous nobody.

Wissner, however, contends that his federal rights were infringed because he was unable to cross-examine accusing witnesses, *i. e.*, the confessors. He contends that the "privilege of confrontation" is secured by the Fourteenth Amendment, relying on one sentence in *Snyder* v. *Massachusetts*, 291 U. S. 97, 107.[38] However, the words cited were quoted verbatim from *Dowdell* v. *United States*, 221 U. S. 325, 330, in which the language was used to describe the purpose of the Sixth Amendment provision on confrontation in federal cases. It was transposed to *Snyder* solely to point out the distinction between a right of confrontation and a mere right of an accused to be present at his own trial.[39] The Court in *Snyder* specifically refrained from holding that there was any right of confrontation under the Fourteenth Amendment,[40] and clearly held to the contrary in *West* v. *Louisiana*, 194 U. S. 258, in which it was decided that the Federal Constitution did not preclude Louisiana from using affidavits on a criminal trial.

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[38] "'It was intended to prevent the conviction of the accused upon depositions or *ex parte* affidavits, and particularly to preserve the right of the accused to test the recollection of the witness in the exercise of the right of cross-examination.'" Petitioner Wissner erroneously assumes that "It" at the beginning of the sentence refers to the Fourteenth Amendment.

[39] *Snyder* involved a contention by a state convict that he was denied due process when the court prevented him from going along when the jury went to view the area where the crime was committed. Among the many bases for deciding against the defendant, the Court, through Mr. Justice Cardozo, pointed out that even if he had a federal right to confrontation (and the Court indicated he did not) his exclusion from a view would not offend it. Hence the use of the language quoted describing the nature of the right of confrontation.

[40] "For present purposes we assume that the privilege is reinforced by the Fourteenth Amendment, though this has not been squarely held. [Citing cases, one of which is *West* v. *Louisiana*.]" 291 U. S., at 106.

Basically, Wissner's objection to the introduction of these confessions is that as to him they are hearsay. The hearsay-evidence rule, with all its subtleties, anomalies and ramifications, will not be read into the Fourteenth Amendment. Cf. *West* v. *Louisiana, supra.*

Perhaps the methods adopted by the New York courts to protect Wissner against any disadvantage from the State's use of the Cooper and Stein confessions were not the most effective conceivable. But "its procedure does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar." *Snyder* v. *Massachusetts, supra,* at 105.

VII.

Third-degree violence has been too often denounced by courts for anything useful to come out of mere repetition of invectives. It is a crime under state law and, in some circumstances, under federal law. *Screws* v. *United States,* 325 U. S. 91; *Koehler* v. *United States,* 189 F. 2d 711, 342 U. S. 852.

When the penalty is death, we, like state court judges, are tempted to strain the evidence and even, in close cases, the law in order to give a doubtfully condemned man another chance. But we cannot see the slightest justification for reading the Fourteenth Amendment to deny the State of New York the power to hold these defendants guilty on the record before us.[41]

We are not willing to discredit constitutional doctrines for protection of the innocent by making of them mere

[41] See Hall, Police and Law in a Democratic Society, 28 Ind. L. J. 133, 175–176; Inbau, The Confession Dilemma in the United States Supreme Court, 43 Ill. L. Rev. 442.

technical loopholes for the escape of the guilty. The petitioners have had fair trial and fair review. The people of the State are also entitled to due process of law.

Affirmed.

MR. JUSTICE BLACK, dissenting.

I concur in MR. JUSTICE DOUGLAS' opinion.

More constitutional safeguards go here—one, the right of a person to be free from arbitrary seizure, secret confinement and police bludgeoning to make him testify against himself in absence of relative, friend or counsel; another, the right of an accused to confront and cross-examine witnesses who swear he is guilty of crime. Tyrannies have always subjected life and liberty to such secret inquisitorial and oppressive practices. But in many cases, beginning at least as early as *Chambers* v. *Florida*, 309 U. S. 227, this Court set aside state convictions as violative of due process when based on confessions extracted by state police while suspects were held incommunicado. That line of cases is greatly weakened if not repudiated by today's sanction of the arbitrary seizure and secret questioning of the defendants here. State police wishing to seize and hold people incommunicado are now given a green light. Moreover, the Court actually holds (unnecessarily, I think) that states are free to deny defendants an opportunity to confront and cross-examine witnesses who testify against them, even in death cases. This also runs counter to what we have said due process guarantees an accused. *In re Oliver*, 333 U. S. 257, 273.* Lastly, today's opinion takes this opportunity

*I do not understand that *West* v. *Louisiana*, 194 U. S. 258, held the contrary. It did hold at pp. 263–264 that a state could introduce depositions for the reason that the accused had "been once confronted with the witness and has had opportunity to cross-examine him . . . , and he is a non-resident and is permanently beyond the jurisdiction of the State . . . ."

to narrow the scope this Court has previously given the Fifth Amendment's guarantee that no person "shall be compelled in any criminal case to be a witness against himself." *Bram* v. *United States*, 168 U. S. 532, 544, held that this constitutional provision forbids federal officers to "browbeat" an accused, or to "push him into a corner, and to entrap him into fatal contradictions . . . ." The Court adds the *Bram* case to those it repudiates today, apparently agreeing with Professor Wigmore that Mr. Justice White's opinion there represents "the height of absurdity . . . ."

In short, the Court's holding and opinion break down barriers that have heretofore stood in the way of secret and arbitrary governmental action directed against persons suspected of crime or political unorthodoxy. My objection to such action by any governmental agent or agency has been set out in many opinions. See for illustration, *Chambers* v. *Florida*, *supra*, and *Ashcraft* v. *Tennessee*, 322 U. S. 143, 327 U. S. 274 (alleged confessions extracted without violence while suspects held incommunicado at the mercy of police officers); *In re Oliver*, 333 U. S. 257 (secret conviction based on incommunicado questioning by three judges where the accused had neither relative, friend nor counsel present); *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 142 (Attorney General's public condemnation of groups as treasonable and subversive based on secret information without notice or hearing); dissenting opinions, *Gallegos* v. *Nebraska*, 342 U. S. 55, 73 (arbitrary arrest, secret imprisonment and systematic questioning to obtain an alleged confession); *Carlson* v. *Landon*, 342 U. S. 524, 547 (Attorney General's denial of bail based on secret charges by secret informers without affording accused a hearing); *Ludecke* v. *Watkins*, 335 U. S. 160, 173 (Attorney General's judicially unreviewable banishment of an alien based on secret undisclosed information

and without a hearing); *Shaughnessy* v. *United States ex rel. Mezei*, 345 U. S. 206, 216 (Attorney General's judicially unreviewable imprisonment and denial of bail to an alien based on secret undisclosed information and without a hearing).

I join MR. JUSTICE FRANKFURTER and MR. JUSTICE DOUGLAS in protesting the Court's action in these cases.

MR. JUSTICE FRANKFURTER, dissenting.

1. Of course the Fourteenth Amendment is not to be applied so as to turn this Court into a tribunal for revision of criminal convictions in the State courts. I have on more than one occasion expressed my strong belief that the requirements of due process do not hamper the States, beyond the narrow limits of imposing upon them standards of decency deeply felt and widely recognized in Anglo-American jurisdictions, either in penalizing conduct or in defining procedures appropriate for securing obedience to penal laws. Nor is this substantial autonomy of the States to be curtailed in capital cases.

2. It is common ground that the third degree—the colloquial term for subjecting an accused to police pressures in order to extract confessions—may reach a point where confessions, although not resulting from the application of physical force, are as a matter of human experience equally the results of coercion in any fair meaning of that term and therefore not "voluntary" in any relevant sense. Differences of view inevitably arise among judges in deciding when that point has been reached. Such differences are reflected in a long series of cases in this Court. An important factor, no doubt, influencing the different conclusions is the varying intensity of feeling on the part of different judges that coercive police methods not only may bring into question the trustworthiness of a confession but tend to brutalize habits of

feeling and action on the part of the police, thereby adversely affecting the moral tone of the community.

Of course, the most serious deference is to be accorded the conclusion reached by a State court that a confession was not coerced. See my concurring opinions in *Malinski* v. *New York*, 324 U. S. 401, 412; *Haley* v. *Ohio*, 332 U. S. 596, 601. But the duty of deference cannot be allowed imperceptibly to slide into an abdication by this Court of its obligation to ascertain whether, under the circumstances of a particular case, a confession represents not the candor of a guilty conscience, the need of an accused to unburden himself, but the means of release from the tightening of the psychological police screws. This issue must be decided without regard to the confirmation of details in the confession by reliable other evidence. The determination must not be influenced by an irrelevant feeling of certitude that the accused is guilty of the crime to which he confessed. Above all, it must not be influenced by knowledge, however it may have revealed itself, that the accused is a bad man with a long criminal record. All this, not out of tenderness for the accused but because we have reached a certain stage of civilization.

In the light of these considerations, I am compelled to conclude that the confessions here were the product of coercive police pressure. I cannot believe that these confessions, in view of the circumstances under which they were elicited, would be admitted in a criminal trial in England, or in the courts of Canada, Australia or India. I regret that the Court reaches another conclusion on the record, though I respect a conscientious interpretation of the record differing from mine.

3. But the Court goes beyond a mere evaluation of the facts of this record. It makes a needlessly broad ruling of law which overturns what I had assumed was

a settled principle of constitutional law. It does so *sua sponte*. The question was not raised and not argued and has emerged for the first time in the Court's opinion. Unless I am mistaken about the reach of the Court's opinion, and I profoundly hope that I am, the Court now holds that a criminal conviction sustained by the highest court of a State, and more especially one involving a sentence of death, is not to be reversed for a new trial, even though there entered into the conviction a coerced confession which in and of itself disregards the prohibition of the Due Process Clause of the Fourteenth Amendment. The Court now holds that it is not enough for a defendant to establish in this Court that he was deprived of a protection which the Constitution of the United States affords him; he must also prove that if the evidence unconstitutionally admitted were excised there would not be enough left to authorize the jury to find guilt.

An impressive body of opinion, never questioned by any decision or expression of this Court, has established a contrary principle. And this not only with reference to the admissibility of coerced confessions; the principle has governed other aspects of disregard of the requirements of the Fourteenth Amendment in State trials. I refer *inter alia* to cases of discrimination in the selection of personnel of a grand jury which found an indictment. We have reversed in such cases even though there was no error in the conduct of the trial itself.

4. It is painful to be compelled to say that the Court is taking a retrogressive step in the administration of criminal justice. I can only hope that it is a temporary, perhaps an *ad hoc*, deviation from a long course of decisions. By its change of direction the Court affords new inducement to police and prosecutors to employ the third degree, whose use the Wickersham Commission found "widespread" more than thirty years ago and

which it unsparingly condemned as "conduct . . . violative of the fundamental principles of constitutional liberty." IV Reports, National Commission on Law Observance and Enforcement, 1, 4, 6 (1931).*

The Wickersham Commission deemed it its duty "to lay the facts—the naked, ugly facts—of the existing abuses before the public," *id.*, at 6, in the hope of arousing public awareness, and thereby public condemnation, of such abuses. It surely is not self-deluding or boastful to believe that the series of cases in which this Court reversed convictions because of such abuses helped to educate public opinion and to arouse in prosecutors and police not only a wholesome fear but also a more conscientious feeling against resort to these lazy, brutal methods.

In addressing himself to law enforcement officials, Director J. Edgar Hoover of the Federal Bureau of Investigation has made these observations: "One of the quickest ways for any law enforcement officer to bring public disrepute upon himself, his organization and the

*The great weight to be attached to the findings of the Wickersham Commission is attested by the impressive experience represented by the members of that Commission. The Chairman, George W. Wickersham, was one of the most notable Attorneys General in the history of that office; Newton D. Baker, after a distinguished public career as Mayor of Cleveland and Secretary of War, became a recognized leader of our bar; William I. Grubb had a long career as one of the most esteemed judges on the federal bench; William S. Kenyon served with distinction first as a United States Senator and later as a federal judge; Monte M. Lemann contributed the balanced judgment derived from his recognized position at the bar; Frank L. Loesch, apart from his general qualifications, brought to the work of the Commission specialized competence in the administration of the criminal law; Paul J. McCormick was a United States district judge of conspicuous courage and hardheadedness; Dean Roscoe Pound's "Criminal Justice in America" is only one bit of evidence of the authority with which he speaks in this field.

entire profession is to be found guilty of a violation of civil rights. . . . Civil rights violations are all the more regrettable because they are so unnecessary. Professional standards in law enforcement provide for fighting crime with intelligence rather than force." (FBI Law Enforcement Bulletin, September, 1952, p. 1.) But if law officers learn that from now on they can coerce confessions without risk, since trial judges may admit such confessions provided only that, perhaps through the very process of extorting them, other evidence has been procured on which a conviction can be sustained, police in the future even more so than in the past will take the easy but ugly path of the third degree. I do not remotely suggest that any such result is contemplated by the Court. But it will not be the first time that results neither desired nor foreseen by an opinion have followed.

5. The matters which I have thus briefly stated cut so deep as to call for full exposition. Since promptness in the disposition of criminal cases is one of the most important factors for a civilized system of criminal justice, I must content myself now with this summary of my views without their elaboration.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK concurs, dissenting.

If the opinion of the Court means what it says, we are entering upon a new regime of constitutional law that should give every citizen pause. Heretofore constitutional rights have had greater dignity than rules of evidence. They have constituted guarantees that are inviolable. They have been a bulwark against overzealous investigators, inhuman police, and unscrupulous prosecutors. They have placed a prohibition on practices which history showed were infamous. An officer

who indulged in the prohibited practices was acting lawlessly; and he could not in any way employ the products of his lawless activities against the citizen whose constitutional rights were infringed. But now it is said that if prejudice is not shown, if there was enough evidence to convict regardless of the invasion of the citizen's constitutional right, the judgment of conviction must stand and the defendant be sent to his death.

In taking that course the Court chooses a short cut which does violence to our constitutional scheme.

The denial of a right guaranteed to a defendant by the Constitution has never been treated by this Court as a matter of mere error in the proceedings below which, if not affecting substantial rights, might be disregarded.

Powell v. *Alabama*, 287 U. S. 45, established the rule that due process requires, in certain cases at least, that the state court appoint counsel to represent an indigent defendant. And the right to counsel includes the right to have counsel appointed in time to allow adequate preparation of the case. Neither in the *Powell* case nor in any of those which followed it has the weight of the evidence against the defendant been deemed relevant to the issue of the validity of the conviction. See *Smith* v. *O'Grady*, 312 U. S. 329; *Williams* v. *Kaiser*, 323 U. S. 471; *Tomkins* v. *Missouri*, 323 U. S. 485; *De Meerleer* v. *Michigan*, 329 U. S. 663. In *Hawk* v. *Olson*, 326 U. S. 271, at 278, we said:

> "Continuance may or may not have been useful to the accused, but the importance of the assistance of counsel in a serious criminal charge after arraignment is too large to permit speculation on its effect. . . .
>
> "Petitioner states a good cause of action when he alleges facts which support his contention that through denial of asserted constitutional rights he

> has not had the kind of trial in a state court which the due process clause of the Fourteenth Amendment requires."

A similar rule prevails where the prosecution has made knowing use of perjured testimony to convict an accused. *Mooney* v. *Holohan*, 294 U. S. 103, 112; *Hysler* v. *Florida*, 315 U. S. 411; *Pyle* v. *Kansas*, 317 U. S. 213. It has never been thought necessary to attempt to weed the perjured testimony from the nonperjured for the purpose of determining the degree of prejudice which resulted.

In *In re Oliver*, 333 U. S. 257, we reversed a conviction for contempt based on a secret trial in which the defendant was denied reasonable notice of the charge against him, the opportunity to prepare a defense, the right to testify on his own behalf, the right to confront the witnesses against him and the right to be represented by counsel. No one, I suppose, would argue that such a conviction should be sustained merely because the record indicated quite conclusively that the defendant was guilty.

In *Moore* v. *Dempsey*, 261 U. S. 86, the Court dealt with a claim that the defendants had been convicted in a trial dominated by a mob. The defendants were charged with the murder of one Lee. They professed their innocence before the Court. Mr. Justice Holmes disposed of the assertion with these words:

> "The petitioners say that Lee must have been killed by other whites, but that we leave on one side as what we have to deal with is not the petitioners' innocence or guilt but solely the question whether their constitutional rights have been preserved."

Another illustration is the practice of discriminating against Negroes in the selection of juries. In none of the cases from *Neal* v. *Delaware*, 103 U. S. 370, and *Carter*

v. *Texas*, 177 U. S. 442, down to *Avery* v. *Georgia*, 345 U. S. 559, decided May 25, 1953, has the lack of a showing of actual prejudice precluded reversal. We indeed said in the *Avery* case that if the jury commissioners failed in their duty to use a nondiscriminatory method of selecting a jury, the "conviction must be reversed—no matter how strong the evidence of petitioner's guilt." 345 U. S., at 561. The reason is plain. The Constitution gives Negroes the right to be tried by juries drawn from the entire community, not hand-picked from the white people alone. Must a Negro now show that he suffered actual prejudice because none of his race served on the jury?

The requirement of counsel, the right of the accused to be confronted with the witnesses against him, his right to be given notice of the charge, his right to a fair and impartial tribunal, his right to a jury drawn from a fair cross-section of the community—none of these guarantees given by the Constitution is more precise than the prohibition against coerced confessions.

The rule now announced is, indeed, contrary to our prior decisions dealing with the effect of a coerced confession on a judgment of conviction. See *Malinski* v. *New York*, 324 U. S. 401, 404; *Stroble* v. *California*, 343 U. S. 181, 190; *Lyons* v. *Oklahoma*, 322 U. S. 596, 597; *Haley* v. *Ohio*, 332 U. S. 596, 599; and *Gallegos* v. *Nebraska*, 342 U. S. 55, 63.

The Court's characterization of these rulings as *dicta* is not correct. In the *Malinski* case a conviction was *reversed* even though other evidence might have supported the verdict. In the *Lyons* case (where the second confession was drawn in question) we noted (322 U. S., at 598) that a third confession was introduced without objection. Yet in spite of that fact we devoted a whole opinion to an analysis of whether the second confession

was voluntary. In the *Stroble* case the California Supreme Court had held that the use of a challenged confession had not deprived petitioner of due process, since it did not appear that the outcome of the trial would have been different if the confession had been excluded. 343 U. S., at 189. We disapproved that view and proceeded on the authority of our decisions in the *Malinski* and *Lyons* cases to examine the facts surrounding the confession to see if it was voluntary. *Id.*, at 190–191.

In each of those three cases we dealt with the merits of the claims that the confessions were coerced—a wholly unnecessary task had the rule as stated in the *Malinski* case not been controlling.

And with respect to the *Malinski* case, it should be noted that, despite a dissent by four Justices, no one took exception to the rule that the use of a coerced confession violates due process.

Perhaps the decision in the instant cases is premised on the view that due process prohibits the use of coerced confessions merely because of their inherent untrustworthiness. If so, that too is a radical departure from the rationale of our prior decisions. In *Lisenba* v. *California*, 314 U. S. 219, 236, Mr. Justice Roberts, speaking for the Court concerning the inadmissibility of coerced confessions, said:

> "The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false."

As MR. JUSTICE FRANKFURTER states in his dissenting opinion, that rule is the product of a civilization which, by respecting the dignity even of the least worthy citizen, raises the stature of all of us and builds an atmosphere of trust and confidence in government.

The practice now sanctioned is a plain violation of the command of the Fifth Amendment, made applicable to the States by the Fourteenth (see *Brown* v. *Mississippi*, 297 U. S. 278, 286; *Chambers* v. *Florida*, 309 U. S. 227, 238), that no man can be compelled to testify against himself.* That should be the guide to our decisions until and unless the Fifth Amendment is itself amended to incorporate the rule the Court today announces.

*From the undisputed facts it seems clear that these confessions would be condemned if the constitutional school of thought which prevailed when *Haley* v. *Ohio*, 332 U. S. 596, *Watts* v. *Indiana*, 338 U. S. 49, *Turner* v. *Pennsylvania*, 338 U. S. 62, and *Harris* v. *South Carolina*, 338 U. S. 68, were decided still was the dominant one.

BRIDGES ET AL. *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 548. Argued May 4, 1953.—Decided June 15, 1953.

In 1945, petitioners testified in a naturalization hearing which resulted in petitioner Bridges' admission to citizenship. In 1949, all three were indicted under § 37 of the old Criminal Code, 35 Stat. 1096, now 18 U. S. C. (Supp. V) § 371, for conspiring to defraud the United States by obstructing the proper administration of its naturalization laws, Bridges was indicted under § 346 (a)(1) of the Nationality Act of 1940 for testifying falsely in the naturalization proceeding that he was not and had not been a member of the Communist Party, and petitioners Schmidt and Robertson were indicted under § 346 (a)(5) of the same Act for wilfully and knowingly aiding Bridges to obtain a certificate of naturalization by false and fraudulent statements. *Held:* The general three-year statute of limitations, 18 U. S. C. (Supp. V), § 3282, is applicable to each of the offenses charged, and the indictment came too late. Pp. 210–228.

1. The running of the general three-year statute of limitations was not suspended by the Wartime Suspension of Limitations Act in relation to the offenses charged in any of the counts. Pp. 215–224.

(a) The Wartime Suspension of Limitations Act applies to offenses involving the defrauding of the United States in any manner, but only when the fraud is of a pecuniary nature or at least of a nature concerning property; and none of the offenses here charged were of such a nature. Pp. 215–221.

(b) The wartime suspension of limitations authorized by Congress in the language of this Act, or similar language in comparable acts, is limited strictly to offenses in which defrauding or attempting to defraud the United States is an essential ingredient of the offense charged. P. 221.

(c) Nothing in § 346 (a)(1) makes fraud an essential ingredient of the offense of making a false material statement under oath in a naturalization proceeding. P. 222.

(d) Nothing in § 346 (a)(5) makes fraud an essential ingredient of the offense of aiding someone to commit a violation of

§ 346 (a)(1), and the insertion in the indictment of the words "procured by fraud" does not change the result. Pp. 222–223.

(e) A charge of conspiracy to commit a certain substantive offense is not entitled to a longer statute of limitations than the charge of committing the offense itself. P. 223.

(f) That § 37 of the old Criminal Code, now 18 U. S. C. (Supp. V) § 371, also applies to conspiracies to defraud the United States "in any manner or for any purpose" does not require a different result as to the charge thereunder in this case. Pp. 223–224.

2. The saving clause in § 21 of the Act of June 25, 1948, codifying the Criminal Code, does not "save" the special five-year statute of limitations of § 346 (g) of the Nationality Act of 1940 so as to apply it to the violations of the latter Act charged in the indictment. Pp. 224–227.

199 F. 2d 811, reversed.

The District Court denied petitioners' motions to dismiss their indictments, 86 F. Supp. 922, and they were convicted. The Court of Appeals affirmed, 199 F. 2d 811, and denied rehearing *en banc*, 201 F. 2d 254. This Court granted certiorari. 345 U. S. 904. *Reversed and remanded*, p. 228.

Telford Taylor argued the cause for petitioners. With him on the brief were *Norman Leonard* and *John P. Frank*.

John F. Davis argued the cause for the United States. With him on the brief were *Acting Solicitor General Stern, Beatrice Rosenberg, Carl H. Imlay* and *John R. Wilkins*.

MR. JUSTICE BURTON delivered the opinion of the Court.

In this proceeding we are limited to the consideration of the following questions: (1) is it barred by the statute of limitations and, if not, (2) is it barred by the principles of *res judicata*, or estoppel, or the Due Process Clause of

the Fifth Amendment? For the reasons hereafter stated, we hold that it is barred by the statute of limitations. We do not reach or discuss the second question.

The issues raised by the first question are:

1. Whether the Wartime Suspension of Limitations Act [1] has suspended the running of the general three-year statute of limitations [2] in relation to the offenses charged in—

Count I, under the general conspiracy statute; [3]

Count II, under § 346 (a)(1) of the Nationality Act of 1940; [4] or

Count III, under § 346 (a)(5) of the Nationality Act of 1940; [5] and

2. Whether the saving clause in § 21 of the Act of June 25, 1948, which enacted the present Criminal Code into law,[6] continued in effect the special five-year statute of limitations of § 346 (g) of the Nationality Act of 1940 [7] in relation to violations of § 346 (a) of that Act.

For the reasons set forth, we reach a negative conclusion on each of the above issues.

Petitioner Harry Bridges entered the United States in 1920 as an immigrant seaman from Australia. Subsequently, he defeated two attempts of the United States to deport him because of his alleged Communist Party membership or affiliation. The second such attempt

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[1] 18 U. S. C. (Supp. V) § 3287.

[2] 18 U. S. C. (Supp. V) § 3282.

[3] § 37 of the Criminal Code, 35 Stat. 1096, 18 U. S. C. § 88, now 18 U. S. C. (Supp. V) § 371.

[4] 54 Stat. 1163, 8 U. S. C. § 746 (a)(1), now 18 U. S. C. (Supp. V) § 1015 (a).

[5] 54 Stat. 1164, 8 U. S. C. § 746 (a)(5), now 18 U. S. C. (Supp. V) § 1425.

[6] 62 Stat. 862.

[7] 54 Stat. 1167, 8 U. S. C. § 746 (g).

culminated June 18, 1945, in *Bridges* v. *Wixon*, 326 U. S. 135.

June 23, 1945, he applied, in the San Francisco office of the Immigration and Naturalization Service, for a Certificate of Arrival and a Preliminary Form for Petition for Naturalization. August 8, he appeared, with petitioners Schmidt and Robertson, before an examiner for a preliminary examination. Each of the three testified that Bridges was not a member of the Communist Party.

September 17, 1945, Bridges appeared in the Superior Court in San Francisco for the naturalization hearing. Schmidt and Robertson testified that they had known Bridges for five years or longer, that he was a resident of the United States during that time and that they vouched for his loyalty to the United States. Bridges gave the following answers under oath:

> "Q. Do you now, or have you ever, belonged to any organization that advocated the overthrow of the government by force or violence?
>
> "A. No.
>
> "Q. Do you now, or have you ever, belonged to the Communist Party in the United States?
>
> "A. I have not, I do not."

He was then admitted to citizenship.

May 25, 1949, more than three years later, a grand jury in the United States District Court for the Northern District of California returned the present indictment in three counts.

Count I charges the three petitioners with a conspiracy to defraud the United States by impairing, obstructing and defeating the proper administration of its naturalization laws by having Bridges fraudulently petition for and obtain naturalization by falsely and fraudulently stating to the naturalization court that he had never belonged to the Communist Party in the United States, and that

such statement was known at all times by each of the petitioners to be false and fraudulent. The appearance and testimony of the petitioners in the naturalization proceeding were alleged as the overt acts in the conspiracy.

That count is laid under the following general conspiracy statute:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand dollars, or imprisoned not more than two years, or both." § 37 of the old Criminal Code, 35 Stat. 1096, 18 U. S. C. § 88, now 18 U. S. C. (Supp. V) § 371.

Count II charges Bridges with wilfully and knowingly making a false statement under oath in the naturalization proceeding when he testified that he was not and had not been a member of the Communist Party. Count II is laid under § 346 (a)(1) of the Nationality Act of 1940, 54 Stat. 1163, 8 U. S. C. § 746 (a)(1), which makes it a felony for any person—

> "Knowingly to make a false statement under oath, either orally or in writing, in any case, proceeding, or matter relating to, or under, or by virtue of any law of the United States relating to naturalization or citizenship." [8]

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[8] Section 346 (a) was repealed by § 21 of the Act of June 25, 1948, 62 Stat. 862, 868. Simultaneously, § 346 (a)(1) was substantially reenacted in 18 U. S. C. (Supp. V) § 1015 (a). For the effect, if any, of the saving clause in § 21 upon the statute of limitations relating to § 346 (a), see pp. 224–227, *infra*.

Count III charges Schmidt and Robertson with wilfully and knowingly aiding Bridges, who was not entitled thereto, to obtain a Certificate of Naturalization which was to be procured by false and fraudulent statements. It avers that they knew that Bridges was a member of the Communist Party and that he had made false and fraudulent representations in the naturalization proceeding. Count III is laid under § 346 (a)(5) of the Nationality Act of 1940, 54 Stat. 1164, 8 U. S. C. § 746 (a)(5), which makes it a felony—

> "To encourage, aid, advise, or assist any person not entitled thereto to obtain, accept, or receive any certificate of arrival, declaration of intention, certificate of naturalization, or certificate of citizenship, or other documentary evidence of naturalization or of citizenship—
>
> "a. Knowing the same to have been procured by fraud; . . . ."[9]

Petitioners each moved to dismiss the indictment on the ground, *inter alia*, that each count was barred by the statute of limitations. The motions were denied. 86 F. Supp. 922. The trial resulted in a jury verdict of guilty on each count. Bridges received concurrent sentences of imprisonment for two years on Count I and five years on Count II. The other petitioners each received concurrent sentences of imprisonment for two years on each of Counts I and III. The Court of Appeals affirmed. 199 F. 2d 811. Rehearing *en banc* was denied. 201 F. 2d 254. Because of an indicated conflict between that decision and part of the decision in *Marzani* v. *United States*, 83 U. S. App. D. C. 78, 168 F. 2d 133, affirmed

[9] See note 8, *supra*, as to repeal of § 346 (a). Simultaneously, § 346 (a)(5) was substantially reenacted in 18 U. S. C. (Supp. V) § 1425.

by an equally divided Court, 335 U. S. 895, 336 U. S. 922, as well as its conflict in part with *United States* v. *Obermeier*, 186 F. 2d 243 (C. A. 2d Cir.), and because of the importance of the issues, we granted certiorari, 345 U. S. 904.[10]

The acts charged occurred in 1945. Accordingly, unless the general three-year statute of limitations is suspended or superseded, the indictment, found in 1949, was out of time and must be dismissed.[11]

I. *The running of the general three-year statute of limitations was not suspended by the Wartime Suspension of Limitations Act in relation to the offenses charged in any of the counts.*

A. The suspension prescribed by the Wartime Suspension of Limitations Act applies to offenses involving the defrauding of the United States or any agency thereof, whether by conspiracy or not, and in any manner, but only where the fraud is of a pecuniary nature or at least of a nature concerning property.

The Wartime Suspension of Limitations Act creates an exception to a long-standing congressional "policy of re-

[10] The grant was limited to questions 1 and 2 presented by the petition for the writ, *viz.*:

"(1) Whether, in view of prior adjudications (including the determination of this Court in *Bridges* v. *Wixon*, 326 U. S. 135), this proceeding is barred, in whole or in part, by the principles of *res judicata*, or estoppel, or the due process clause of the Fifth Amendment.

"(2) Whether this proceeding is barred by the statute of limitations."

[11] "Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within three years next after such offense shall have been committed." 18 U. S. C. (Supp. V) § 3282.

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pose" that is fundamental to our society and our criminal law. From 1790 to 1876, the general limitation applicable to noncapital offenses was two years and since then it has been three years.[12] In relation to a comparable exception stated in § 1110 (a) as the limitation applicable under the Revenue Act of 1926,[13] Mr. Justice Roberts, speaking for the Court, said:

> "Moreover, the concluding clause of the section, though denominated a proviso, is an excepting clause and therefore to be narrowly construed. *United States* v. *McElvain*, 272 U. S. 633, 639.[14] And as the section has to do with statutory crimes it is to be liberally interpreted in favor of repose, and ought not to be extended by construction to embrace so-called frauds not so denominated by the statutes creating offenses." *United States* v. *Scharton*, 285 U. S. 518, 521–522.

The legislative history of this exception emphasizes the propriety of its conservative interpretation. It indicates a purpose to suspend the general statute of limitations only as to war frauds of a pecuniary nature or of a nature concerning property. It nowhere suggests a purpose to swallow up the three-year limitation to the extent necessary to reach the offenses before us.

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[12] 1 Stat. 119; R. S. § 1044; 19 Stat. 32–33. The limitation as to treason or other capital offenses was three years from 1790 until it was removed in 1939. 1 Stat. 119; R. S. § 1043; 53 Stat. 1198; 18 U. S. C. (Supp. V) § 3281.

[13] 44 Stat. 114–115, 18 U. S. C. (1925 ed., Supp. V) § 585.

[14] ". . . The purpose of the added proviso [to the general limitation section] was to carve out a special class of cases. It is to be construed strictly, and held to apply only to cases shown to be clearly within its purpose." *United States* v. *McElvain*, 272 U. S. 633, 639.

The present Suspension Act had its origin in the Act of August 24, 1942.[15] See *United States* v. *Smith*, 342 U. S. 225, 226–227. That Act was a wartime measure reviving for World War II substantially the same exception to the general statute of limitations which, from 1921 to 1927, had been directed at the war frauds of World War I.[16]

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[15] ". . . the running of any existing statute of limitations applicable to offenses involving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, and now indictable under any existing statutes, shall be suspended until June 30, 1945, or until such earlier time as the Congress by concurrent resolution, or the President, may designate. . . ." 56 Stat. 747–748.

This was amended in 1944 by the insertion of more specific references to war contracts and to the handling of property under the Surplus Property Act of 1944. 58 Stat. 667 and 781. Since September 1, 1948, 18 U. S. C. (Supp. V) § 3287 has provided that—

"When the United States is at war the running of any statute of limitations applicable to any offense (1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not, or (2) committed in connection with the acquisition, care, handling, custody, control or disposition of any real or personal property of the United States, or (3) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancelation, or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the war, or with any disposition of termination inventory by any war contractor or Government agency, shall be suspended until three years after the termination of hostilities as proclaimed by the President or by a concurrent resolution of Congress. . . ."

The President proclaimed the termination of hostilities of World War II, December 31, 1946. 3 CFR, 1946 Supp., 77–78.

[16] "SEC. 1044. . . . : *Provided, however*, That in offenses involving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, and now indictable under any existing statutes, the period of limitation shall be six years. . . ." 42 Stat. 220, November 17, 1921.

This proviso was eliminated by 45 Stat. 51, December 27, 1927.

The Committee Reports show that in 1921 Congress aimed the proviso at the pecuniary frauds growing out of war contracts.[17] Congress was concerned with the exceptional opportunities to defraud the United States that were inherent in its gigantic and hastily organized procurement program. It sought to help safeguard the treasury from such frauds by increasing the time allowed for their discovery and prosecution. In 1942, the reports

[17] In 1921, H. R. Rep. No. 365, 67th Cong., 1st Sess. 1, supporting the bill to enact the proviso, said:

"The Department of Justice has been engaged in the investigation and is now engaged in the investigation of various alleged offenses, consisting largely of frauds against the Government which are claimed to have occurred during the war with Germany and since its conclusion. Many of these alleged offenses grew out of the [contractual] relation of the Government with various persons and corporations engaged in the furnishing of military and naval supplies of various kinds. Many of these transactions require the most minute investigation in order to ascertain the exact facts, and in every case a considerable period must elapse before such facts may be gathered from the files and other sources that the department may know whether prosecutions are justified or not. In many cases months, and perhaps considerable longer periods, will be required for such investigations." See also, 61 Cong. Rec. 7060-7061, 7640.

In 1927, H. R. Rep. No. 16, 70th Cong., 1st Sess. 1, supporting the bill to eliminate the 1921 proviso, said:

"In 1921 the Attorney General represented that he was desirous of having further time to investigate alleged war frauds, and that owing to the nature of the investigations the statute of limitations might run before it would be possible to obtain indictments, and he therefore requested that the period of the statute of limitations applicable to conspiracy to defraud the Government of the United States should be extended from three years to six years. The Congress complied with the request and the limitation was extended from three to six years as to that particular class of offenses.

"The reasons for the above change have ceased to exist; that is, the Department of Justice announced some time ago that it did not propose to attempt any further prosecution of offenses of that character, that is to say, offenses giving rise to the statute." See also, 69 Cong. Rec. 473, 842.

and proceedings demonstrate a like purpose, coupled with a design to readopt the World War I policy.[18]

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[18] In 1942, S. Rep. No. 1544, 77th Cong., 2d Sess. 1, 2, supporting the suspension of the running of the statute, said:

"The purpose of the proposed legislation is to suspend any existing statutes of limitations applicable to offenses involving the defrauding or attempts to defraud the United States or any agency thereof, for the period of the present war. Contracting for the United States is done through its various agencies, including the departments and independent establishments and Government-owned and Government-controlled corporations, and frauds against all of these agencies are intended to be embraced by the bill.

"During the World War many frauds committed against the Government were not discovered until the 3-year statute of limitations had almost expired, and as stated in the committee report hereinafter referred to, many of the alleged offenses were barred from prosecution. The general criminal statute of limitations (Rev. Stats., sec. 1044) was amended on November 17, 1921, extending the period to 6 years in respect to offenses involving frauds against the United States . . . .

. . . . . .

"During normal times the present 3-year statute of limitations may afford the Department of Justice sufficient time to investigate, discover, and gather evidence to prosecute frauds against the Government. The United States, however, is engaged in a gigantic war program. Huge sums of money are being expended for materials and equipment in order to carry on the war successfully. Although steps have been taken to prevent and to prosecute frauds against the Government, it is recognized that in the varied dealings opportunities will no doubt be presented for unscrupulous persons to defraud the Government or some agency. These frauds may be difficult to discover as is often true of this type of offense and many of them may not come to light for some time to come. The law-enforcement branch of the Government is also busily engaged in its many duties, including the enforcement of the espionage, sabotage, and other laws."

A similar statement was made in H. R. Rep. No. 2051, 77th Cong., 2d Sess. 1-2, supporting the same bill, H. R. 6484. See also, 88 Cong. Rec. 6160. This bill, readopting the 1921 policy, was introduced at the suggestion of the Attorney General in lieu of a proposal then pending to suspend the running of the statute of limitations

This interpretation of the scope of the 1942 provision was expressly approved in *Marzani* v. *United States*, 83 U. S. App. D. C. 78–82, 168 F. 2d 133–137. As to nine counts based upon the amended False Claims Act, the Court of Appeals for the District of Columbia Circuit held that the 1942 Wartime Suspension of Limitations Act did not suspend the three-year statute of limitations. Those counts charged that false statements had been made to government agencies in relation to Communist Party membership, in connection with an application for a position in the government service. Referring to *United States* v. *Gilliland*, 312 U. S. 86, the Court of Appeals said:

> "Thus, the [Supreme] Court held that defrauding the United States in a pecuniary or financial sense is not a constituent ingredient of offenses under the False Claims Act.
>
> "It necessarily follows, in our view, that the Suspension Act does not apply to offenses under the False Claims Act. The Supreme Court has clearly said (1) that a statute identical in pertinent part with the Suspension Act does not apply to offenses of which defrauding the United States in a pecuniary way is not an essential ingredient; and (2) that such defrauding of the United States is not an essential ingredient of offenses under the False Claims statute." 83 U. S. App. D. C., at 81, 168 F. 2d, at 136.

Brought here on several issues, including dismissal of the nine counts, that case was twice affirmed, without opinion, by an evenly divided Court. 335 U. S. 895, 336

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for every offense punishable under the laws of the United States. Hearings before Subcommittee No. 4 of the House Committee on the Judiciary on H. R. 4916, 77th Cong., 1st Sess. 6, 8, and see 88 Cong. Rec. 4759–4760.

U. S. 922. See also, *United States* v. *Cohn*, 270 U. S. 339.[19]

As the offenses here charged are those of knowingly making a false statement under oath in a proceeding relating to naturalization (Count II), or of conspiring to have someone do so (Count I), or of aiding someone to obtain a Certificate of Naturalization knowing it to be procured by fraud (Count III), none of them involve the defrauding of the United States in any pecuniary manner or in a manner concerning property. We accordingly hold that, for that reason, the Wartime Suspension of Limitations Act does not apply to those offenses.

B. A further ground for our conclusion is that this Court already has interpreted the language before us, or similar language in comparable Acts, to mean that the wartime suspension of limitations authorized by Congress is limited strictly to offenses in which defrauding or attempting to defraud the United States is an *essential ingredient of the offense charged*. Decisions of this Court, made prior to 1942, had so interpreted the earlier legislation that its substantial reenactment, in 1942, carried with it the interpretation above stated. *United States* v. *Scharton*, 285 U. S. 518; *United States* v. *McElvain*, 272 U. S. 633; *United States* v. *Noveck*, 271 U. S. 201. See also, *Braverman* v. *United States*, 317 U. S. 49, 54–55, and *United States* v. *Cohn*, 270 U. S. 339.

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[19] *Haas* v. *Henkel*, 216 U. S. 462, and *Hammerschmidt* v. *United States*, 265 U. S. 182, are not to the contrary. The statements there made refer to conspiracies to defraud the United States "in any manner or for any purpose" as used in the second clause of the general conspiracy section. See § 37 of the old Criminal Code, 35 Stat. 1096, now § 371 of the new Criminal Code, 18 U. S. C. (Supp. V). See also, *United States* v. *Gilliland*, 312 U. S. 86. They do not control the interpretation of the provisions in the Wartime Suspension of Limitations Act discussed in this opinion.

The simplest demonstration of this point appears in Count II. The offense there charged is that Bridges knowingly made a false material statement in a naturalization proceeding. In that offense, as in the comparable offense of perjury, fraud is not an essential ingredient. The offense is complete without proof of fraud, although fraud often accompanies it. The above-cited cases show that even though the offense may be committed in a pecuniary transaction involving a financial loss to the Government, that fact, alone, is not enough to suspend the running of the three-year statute of limitations. Under the doctrine of these cases, the suspension does not apply to the offense charged unless, under the statute creating the offense, fraud is an essential ingredient of it. The purpose of the Wartime Suspension of Limitations Act is not that of generally suspending the three-year statute, *e. g.*, in cases of perjury, larceny and like crimes. It seeks to suspend the running of it only where fraud against the Government is an essential ingredient of the crime. In view of the opportunity to commit such frauds in time of war, and in view of the difficulty of their prompt discovery and prosecution, the Government seeks extra time to deal with them. Nothing in § 346 (a)(1) makes fraud an essential ingredient of the offense of making a false material statement under oath in a naturalization proceeding.

Likewise, in Count III, the aiding of someone to commit that offense, in violation of § 346 (a)(5), does not require proof of fraud as an essential ingredient. If, as here, the main offense is complete with the proof of perjury, the suspension does not apply to the charge of aiding in the commission of that offense. The insertion in the indictment of the words "procured by fraud" does not change the offense charged. The embellishment of the indictment does not lengthen the time for prosecution. It is

the statutory definition of the offense that determines whether or not the statute of limitations comes within the Suspension Act.

So it is with Count I. A charge of conspiracy to commit a certain substantive offense is not entitled to a longer statute of limitations than the charge of committing the offense itself. There is no additional time prescribed for indictments for conspiracies as such. The insertion of surplus words in the indictment does not change the nature of the offense charged.

> "The language of the proviso cannot reasonably be read to include all conspiracies as defined by § 37. [The general conspiracy section of the old Criminal Code, now 18 U. S. C. (Supp. V) § 371.] But if the proviso could be construed to include any conspiracies, obviously it would be limited to those to commit the substantive offenses which it covers." *United States* v. *McElvain*, 272 U. S. 633, 639.

The Government contends that the General Conspiracy Act [29] under which Count I is laid comprises two classes of conspiracies: (1) "to commit any offense against the United States" and (2) "to defraud the United States in any manner or for any purpose." It urges that the indictment here charges a conspiracy to defraud the United States under the second clause. It suggests that, under that clause, proof of a specific intent to defraud is an essential ingredient of the offense and thus brings Count I within the Suspension Act. The fallacy in that argument is that, while the indictment may be framed in the language of the second clause, both it and the proof to support it rely solely on the fact of a conspiracy to commit the substantive offenses violating § 346 (a)(1) or

[29] § 37 of the old Criminal Code, 35 Stat. 1096, 18 U. S. C. § 88, now 18 U. S. C. (Supp. V) § 371, see p. 213, *supra*.

§ 346 (a)(5) as charged in Counts II and III. Count I actually charges that petitioners conspired to "defraud the United States" only by causing the commission of the identical offenses charged in Counts II and III. The use in Count I of language copied from the second clause of the conspiracy statute merely cloaks a factual charge of conspiring to cause, or knowingly to aid, Bridges to make a false statement under oath in his naturalization proceeding, or to obtain by false statements a Certificate of Naturalization to which he was not entitled.

The Court of Appeals in *Marzani* v. *United States, supra,* was convinced that the Suspension Act did not apply to such offenses, as those here involved, under the False Claims Act, no matter what words descriptive of fraud were added to the indictment, so long as fraud was not an essential ingredient of the offense defined in the statute. Another Court of Appeals arrived at a like conclusion in *United States* v. *Obermeier,* 186 F. 2d 243, 256–257, with respect to offenses under the statute involved in Count II of the instant indictment.

II. *The saving clause in § 21 of the Act of June 25, 1948, does not "save" the special five-year statute of limitations of the Nationality Act of 1940 so as to apply it to the violations of that Act charged in Counts II and III.*

The Government contends, alternatively, that the indictment, which was found May 25, 1949, was timely as to Counts II and III, even if the Suspension Act is not applicable to this indictment. Its alternative contention is that those counts respectively charge violations of § 346 (a)(1) and (5) of the Nationality Act of 1940 which occurred in 1945 and that the indictment for them was found within the special five-year limitation of § 346 (g)

of that Act.[21] It appears, however, that § 346 (a–h) was expressly repealed, as of September 1, 1948, by § 21 of the Act of June 25, 1948, which enacted the new Criminal Code into law. Including its controversial saving clause, that repealing section reads as follows:

> "SEC. 21. The sections or parts thereof of the Revised Statutes or Statutes at Large enumerated in the following schedule are hereby repealed.[22] Any rights or liabilities now existing under such sections or parts thereof shall not be affected by this repeal." 62 Stat. 862.

By such repeal of § 346 (g), the general three-year statute of limitations became applicable. 18 U. S. C. (Supp. V) § 3282.[23] Three years having expired before the indictment was found, § 3282 bars the instant indictment. The Government, however, contends that the above-quoted saving clause in § 21 refers not only to substantive liabilities but also to the period during which a crime may be prosecuted and thus includes the special five-year limitation contained in § 346 (g). This issue was presented to the Court of Appeals in the instant case and was decided against the Government. 199 F. 2d 811, 819–820. In doing so, the court relied in part upon a like conclusion of the Court of Appeals for the Second Circuit in *United States* v. *Obermeier, supra*. That case related to an indictment in two counts for knowingly making, in

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[21] "(g) No person shall be prosecuted, tried, or punished for any crime arising under the provisions of this Act unless the indictment is found or the information is filed within five years next after the commission of such crime." 54 Stat. 1167, 8 U. S. C. § 746 (g).

[22] In that schedule of repealed sections, at 62 Stat. 868, are §§ 346 (a–h), (l), and 347 of the Nationality Act of 1940, also identified as from Chapter 876, 54 Stat. 1163–1168, approved October 14, 1940.

[23] See note 11, *supra*.

1945, in a naturalization proceeding, as here, false statements under oath in relation to membership in the Communist Party. The review of legislative materials and court decisions made there need not be repeated here in reaching the same result—that the saving clause in § 21 did not keep the special five-year limitation alive after September 1, 1948.[24]

The purpose of Congress to substitute the general three-year limitation in place of the special five-year limitation is indicated in the Reviser's Note to 18 U. S. C. (Supp. V) § 3282 which says:

> "In the consolidation of these sections the 5-year period of limitation for violations of the Nationality Code, provided for in said section 746 (g) of title 8, U. S. C., 1940 ed., Aliens and Nationality, is reduced to 3 years. There seemed no sound basis for considering 3 years adequate in the case of heinous felonies and gross frauds against the United States but inadequate for misuse of a passport or false statement to a naturalization examiner."

To adopt the interpretation proposed by the Government would produce the situation that offenses committed in August, 1948, would be indictable until August, 1953, whereas like offenses committed in the following October, 1948, would not be indictable after October, 1951. The longer period for the prosecution of the earlier offenses has no relation to war conditions. Such a result is not to be inferred without a clear direction to that effect.

Finally, to interpret the words "rights or liabilities" in the saving clause as including such procedural incidents as the period within which indictments may be found

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[24] In *United States* v. *Smith*, 342 U. S. 225, 226–227, n. 1, we assumed, without deciding, that this reservation had no effect on the running of a statute of limitations.

would overlook the practice of Congress to specify the saving of such limitations expressly when and if Congress wished them to be "saved." In the Revised Statutes of 1874, § 5598 preserved "All offenses committed, and all penalties or forfeitures" but, nevertheless, § 5599 was inserted to add "All acts of limitation, whether applicable to civil causes and proceedings, or to the prosecution of offenses, or for the recovery of penalties or forfeitures . . . ."[25] The 1909 Criminal Code contained similar provisions in §§ 343 and 344. 35 Stat. 1159. In 1933, when the Revised Statutes were reexamined and obsolete sections (including § 5598) were repealed, § 5599 was retained. 47 Stat. 1431. The reason then given for its retention was that the survival clause in the general repealing statute, 47 Stat. 1431, referred "only to 'rights' and 'liabilities' and not to remedies, recourse to which may be barred by limitation." S. Rep. No. 1205, 72d Cong., 2d Sess. 3. See *Campbell* v. *Holt*, 115 U. S. 620.

As the general three-year statute of limitations is applicable to each of the offenses charged and has been neither suspended by the Wartime Suspension of Limitations Act, nor made inapplicable by § 21 of the Act of June 25, 1948, the indictment in this proceeding came too late to be effective. The motion to dismiss it should

[25] See also, the general saving clause that was in the Revised Statutes but has been regarded as not applicable to matters of remedy and procedure:

"SEC. 13. The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability."

See 1 U. S. C. (Supp. V) § 109; *Hallowell* v. *Commons*, 239 U. S. 506; *Hertz* v. *Woodman*, 218 U. S. 205, 218; *Great Northern R. Co.* v. *United States*, 208 U. S. 452.

have been granted when first made. The judgment of the Court of Appeals, accordingly, is reversed and the cause is remanded to the District Court with direction to dismiss the indictment.

Reversed and remanded.

Mr. Justice Jackson and Mr. Justice Clark took no part in the consideration or decision of this case.

Mr. Justice Reed, with whom The Chief Justice and Mr. Justice Minton join, dissenting.

The limitation for prosecutions under the second clause of 18 U. S. C. § 371, conspiracy to defraud the United States, formerly fixed at three years by 18 U. S. C. § 3282, limitation for offenses not capital, is suspended for us by the Wartime Suspension of Limitations Act, 18 U. S. C. § 3287. The Code sections so far as applicable appear below.[1] As stated in the Court's opinion, the indictment

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[1] 18 U. S. C. § 371:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Id., § 3282:

"Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within three years next after such offense shall have been committed."

Id., § 3287:

"When the United States is at war the running of any statute of limitations applicable to any offense (1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not, . . . shall be suspended until three years after the termination of hostilities as proclaimed by the President or by a concurrent resolution of Congress."

under § 371 was brought more than three years after the alleged offense but within time if the wartime suspension applies. The applicability of that section, § 3287, depends upon whether the conspiracy charged in the indictment was an offense "involving fraud . . . against the United States . . . in any manner, whether by conspiracy or not," within the meaning of said § 3287.

An indictment under § 371 may be found for conspiracy to commit any offense against the United States, or to defraud the United States. These are alternative, disjunctive provisions. One addresses itself to the conspiracy to commit substantive offenses specified under other statutes; the other to a conspiracy to defraud the United States. Such a conspiracy is itself the substantive offense charged in the indictment. This construction has been accepted by the courts without variation.[2]

The indictment, Count I, charges conspiracy "to defraud the United States by impairing, obstructing and defeating the proper administration of its naturalization laws" by causing Bridges falsely and fraudulently to state that he "had never belonged to the Communist Party in the United States." We think that this alleged offense, since it is an effort to defraud the United States by impairing or obstructing or defeating its naturalization laws, obviously falls within the terms of the suspension of limitations, § 3287, "involving fraud" "by conspiracy."

We see nothing in the legislative history of § 3287 to raise a question as to its applicability to this indictment. The opinion of the Court quotes excerpts from reports concerning the need of suspension of limitation following the First World War. A statute was then passed, which

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[2] *Falter* v. *United States*, 23 F. 2d 420, 423–424; *Miller* v. *United States*, 24 F. 2d 353, 360; *United States* v. *Holt*, 108 F. 2d 365, 368. Cf. *United States* v. *Manton*, 107 F. 2d 834, 838–839, a case in which two Justices of this Court sat as Circuit Justices.

we accept as having been enacted for the same purpose and with the same coverage as the present legislation. See n. 15 of the Court's opinion. Those reports do show that war frauds of a pecuniary nature were uppermost in the minds of Congress. Court's opinion, n. 17. This was only natural in view of the haste and waste of war but it does not follow logically that frauds against the proper exercise of governmental functions are excluded. The cited excerpts do not specifically exclude them. Certainly frauds impairing, obstructing or defeating selective service,[3] alien property,[4] administration of prices and wages[5] and the allotment of scarce material,[6] as well as the Immigration and Nationality Acts, would hardly be omitted knowingly by Congress from a suspension of limitation for frauds against the Government. Yet, many of these would fall under the Court's interpretation that wartime suspension applies only to war frauds of a pecuniary nature or of a nature concerning property. It was as hard, perhaps harder, to find and punish frauds against administration as those of a pecuniary or property nature. A general amnesty bill against war frauds would be fairer than to hold only those guilty of financial frauds. Both the purpose and the language of the Suspension Act lead to the conclusion that frauds against administration are within its scope.

The Court asserts that the Wartime Suspension Act should be limited to those frauds of a pecuniary or property nature because the Act is an exception to a "long-standing congressional 'policy of repose.'" Of course,

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[3] Selective Service Act of 1948, 62 Stat. 604, 50 U. S. C. App. §§ 321, 451–470, 1001–1017.

[4] Trading With the Enemy Act, 40 Stat. 411, as amended, 55 Stat. 839, 50 U. S. C. App. § 1 *et seq.*

[5] Defense Production Act of 1950, 64 Stat. 798, as amended, 65 Stat. 131, 66 Stat. 298, 50 U. S. C. App. § 2061 *et seq.*, §§ 2101–2110.

[6] *Ibid.*, §§ 1912, 2072, 2073.

statutes of limitation are statutes of repose. But our public policy is fixed by Congress, not by the courts.[7] The public policy on repose for wartime frauds is fixed by the Suspension Act and it is the words of that Act that determine our policy, not some general feeling that litigation over frauds should end.

Nor can we accept the Court's reliance on *Marzani* v. *United States*, 83 U. S. App. D. C. 78, 82, 168 F. 2d 133, 137, as a sound precedent for construing the Wartime Suspension of Limitations Act to apply only to frauds of a pecuniary or property nature. On review this Court was evenly divided. The Court of Appeals held that the Wartime Suspension Act did not apply because "[t]he Supreme Court has clearly said (1) that a statute identical in pertinent part with the Suspension Act does not apply to offenses of which defrauding the United States in a pecuniary way is not an essential ingredient; and (2) that such defrauding of the United States is not an essential ingredient of offenses under the False Claims statute." 83 U. S. App. D. C., at 81, 168 F. 2d, at 136. Marzani was indicted under the False Claims Act.[8]

The cases relied upon for the first point are *United States* v. *Noveck*, 271 U. S. 201; *United States* v. *McElvain*, 272 U. S. 633; and *United States* v. *Scharton*, 285 U. S. 518. Noveck's case held that an indictment for perjury in an income tax return was barred, despite a suspension statute much like § 3287, because fraud was not an element of the crime of perjury. McElvain's case held similarly as to the substantive offense of a willful attempt to evade a tax. Scharton's case followed Noveck's and held that fraud on the United States was not an ingredient of evading a tax by false statements.

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[7] *Hurd* v. *Hodge*, 334 U. S. 24, 34–35.

[8] 18 U. S. C. (1946 ed.) § 80, substantially reenacted, 18 U. S. C. § 287.

Under the second point, the Court of Appeals relied upon *United States* v. *Gilliland*, 312 U. S. 86. There this Court held that the 1934 Amendment to Criminal Code § 35, 48 Stat. 996, enlarged § 35 so as to include false representations in any documents "within the jurisdiction of any department or agency of the United States." 312 U. S., at 90. Thus the former holding of this Court that the False Claims Act was restricted to "pecuniary or property loss," *United States* v. *Cohn*, 270 U. S. 339, 346, 347, was made inapplicable to the section as amended. The Court of Appeals, however, thought that the *Gilliland* decision meant that defrauding the United States in a financial sense is not an essential ingredient under the False Claims Act. Therefore the Suspension Act did not apply. Cf. *United States* v. *Gottfried*, 165 F. 2d 360, 367. It is immaterial whether the Court of Appeals was correct in thinking that defrauding the United States in a financial sense was not an essential ingredient of the False Claims Act. We think it clear that defrauding the United States is an essential ingredient of this charge of conspiracy under § 371. We do not think *Marzani* adds strength to the Court's position that the Suspension Act applies only to financial fraud.

The cases both under the first and second points of the *Marzani* decision deal with the suspension statutes as applied to substantive crimes that did not require proof of fraud against the United States for conviction. It was enough that the charge and proof showed perjury, false swearing or misrepresentation to a government agency. Fraud was not an essential ingredient. The contrary is true in the present prosecution under Count I.

As we showed in the second paragraph of this opinion, the substantive crime here charged is the conspiracy to defraud the United States, punishable as a conspiracy. The fraud is an essential element. There can be no doubt that this crime, denounced by § 371, covers nonpecuniary

or nonproperty frauds. This has been true since *Haas* v. *Henkel*, 216 U. S. 462, 479.[3] We do not agree with the Court's analysis of the indictment that the offenses charged in Count I are "knowingly making a false statement" in a naturalization proceeding or aiding to obtain a certificate of naturalization by fraud. These are the overt acts of the Count I conspiracy, not the substantive offense of defrauding the Government in its administrative processes charged in Count I.

As Count I describes the substantive offense of conspiracy to defraud the United States, we do not agree with the Court's statement that:

> "The use in Count I of language copied from the second clause of the conspiracy statute merely cloaks a factual charge of conspiring to cause, or knowingly to aid, Bridges to make a false statement under oath in his naturalization proceeding, or to obtain by false statements a Certificate of Naturalization to which he was not entitled."

To prove the substantive offense of conspiracy under § 371 it is necessary to prove the fraud. It cannot be said that a false statement as to Communist membership in a naturalization hearing would not be a fraud against the administration of the naturalization laws within the language of *Haas* v. *Henkel*, *supra*, of "impairing, obstructing or defeating the lawful function of any department of Government." P. 479.

We therefore would affirm the judgment below as to Count I. Petitioners have also contended here that the conviction is barred because the principles of *res judicata* or collateral estoppel require us to hold that Bridges' nonmembership during the crucial period has been judi-

[3] See also *United States* v. *Cohn*, 270 U. S. 339, 346; *Hammerschmidt* v. *United States*, 265 U. S. 182, 188; cf. *United States* v. *Lepowitch*, 318 U. S. 702.

cially determined. They point to the Landis proceedings of 1938, referred to in *Bridges* v. *Wixon*, 326 U. S. 135, 138, this Court's decision in that case, and the naturalization proceedings themselves of 1945. None of these, though, are *res judicata*, since this is a criminal cause. Nor can collateral estoppel be invoked. There has been no court holding that Bridges has not been a Communist. The Landis determination of then nonmembership was not a judicial one. *Pearson* v. *Williams*, 202 U. S. 281. In *Bridges* v. *Wixon*, *supra*, no holding on the factual question of membership was reached. And the naturalization proceedings did not determine nonmembership, because Bridges could legally have been granted citizenship even had he been found by the Court to have been a member of the Communist Party. See 8 U. S. C. (1946 ed.) §§ 705, 707, which merely prohibited grant of naturalization to members of organizations advocating the overthrow of the Government, or to those not attached to the Constitution. This has been changed. 8 U. S. C. A. § 1424 (a)(2). There is no necessary identity in law between Communist Party members and such persons. See *Schneiderman* v. *United States*, 320 U. S. 118. Cf. *Carlson* v. *Landon*, 342 U. S. 524, 536, n. 22.

As our views have not prevailed as to Count I, we forbear to express any views as to Counts II and III.

UNITED STATES v. GRAINGER.

NO. 634. APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA.*

Argued May 4–5, 1953.—Decided June 15, 1953.

1. The running of the general three-year statute of limitations on federal prosecutions for crimes, now 18 U. S. C. (Supp. V) § 3282, was suspended by the Wartime Suspension of Limitations Act, 18 U. S. C. (Supp. V) § 3287, as to violations, in 1945 and 1946, of the *false claims clause* of the False Claims Act, now 18 U. S. C. (Supp. V) § 287. Pp. 240–244.

(a) The offenses charged here of attempting to obtain payments from the Commodity Credit Corporation in amounts based upon knowingly false certifications to that corporation by the accused that certain purchases of wool had been made by him when he knew that no such purchases had been made by him or, at least, that no such purchases had been made by him at prices as high as those he certified that he paid, are offenses of a pecuniary nature. Pp. 240–241.

(b) Offenses which occurred in 1945 or 1946, preceding the President's proclamation of December 31, 1946, declaring that the hostilities of World War II terminated on that day, come within the period to which the Suspension Act applies. P. 241.

(c) Fraud upon the United States is an essential ingredient of violations of the *false claims clause* of the False Claims Act, 18 U. S. C. (Supp. V) § 287. Pp. 241–243.

(d) In the Wartime Suspension of Limitations Act, the phrase "involving fraud . . . in any manner" makes the Act applicable to offenses which are fairly identifiable as those in which fraud is an essential ingredient, by whatever words they be defined; it does not limit the application of the Act to such offenses as Congress has denominated as "frauds" by using that very word or one of its derivatives. The same reasoning applies to conspiracies to commit such offenses. Pp. 243–244.

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*Together with No. 635, *United States* v. *Clavere et al.*, and No. 636, *United States* v. *Clavere et al.*, both also on appeal from the same Court.

2. The Wartime Suspension of Limitations Act had the effect of extending through 1952 the time for the prosecution of the offenses to which it applied. Pp. 244–246.
3. In relation to those offenses here involved which were committed in 1945 and 1946, during the period of suspension, the general three-year limitation prescribed by 18 U. S. C. (Supp. V) § 3282 began to run for the first time on January 1, 1950, and expired December 31, 1952. Pp. 246–247.
4. The codification of the Criminal Code, June 25, 1948, effective September 1, 1948, did not change the situation respecting the extension through 1952 of the time for prosecuting the offenses to which the Wartime Suspension of Limitations Act applied. Pp. 247–248.
5. The Wartime Suspension of Limitations Act is applicable to the indictments here involved for offenses committed in 1945 and 1946 and the United States could thus prosecute them in 1952, except that (1) this conclusion does not apply to any overt act alleged in No. 636 to have been committed in 1947, and (2) this conclusion does not apply to overt acts set forth in paragraphs 2, 3, and 4, under Count Two of the Indictment in No. 636, which are not explicit enough to show that the issuance or endorsement of certain checks there described constituted an attempt to defraud the United States. Pp. 236–248; p. 237, n. 1.

Reversed and remanded.

John F. Davis argued the cause for the United States. With him on the brief were *Robert L. Stern*, then Acting Solicitor General, *Beatrice Rosenberg* and *John R. Wilkins*. *Walter J. Cummings, Jr.*, then Solicitor General, was on the Statement as to Jurisdiction.

Jack J. Miller argued the cause and filed a brief for appellee in No. 634.

John V. Lewis argued the cause for appellees in Nos. 635 and 636. With him on the brief was *Clyde C. Sherwood*.

MR. JUSTICE BURTON delivered the opinion of the Court.

These cases were argued immediately following No. 548, *Bridges* v. *United States*, *ante*, p. 209. They concern the

Wartime Suspension of Limitations Act which we found inapplicable to the offenses stated in the Bridges indictment. These cases, however, involve different offenses and we hold the Suspension Act applicable to the instant indictments for offenses committed in 1945 and 1946 and we hold that the United States may thus prosecute them in 1952.[1]

The principal questions here are: (1) whether the Wartime Suspension of Limitations Act [2] suspended the running of the general three-year statute of limitations [3] as to violations of the false claims clause of the False Claims Act,[4] and (2) if so, whether the indictments for such offenses, found in 1952, were timely. For the reasons hereafter stated, our answer to each question is in the affirmative.

These indictments were filed in 1952 in the United States District Court for the Northern District of California. The indictment in No. 634 charges appellee Grainger, in 16 counts, with having "unlawfully, know-

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[1] This conclusion does not apply to any overt act alleged in No. 636 to have been committed in 1947. Any such act was committed after the President's proclamation of the termination of hostilities December 31, 1946, 3 CFR, 1946 Supp., 77–78, and, therefore, after the period to which the Suspension Act applied. *United States* v. *Smith*, 342 U. S. 225.

The indictment in No. 636 is not explicit enough as to the overt acts set forth in paragraphs numbered 2, 3 and 4, under Count Two, to show that the issuance or endorsement of certain checks there described constituted an attempt to defraud the United States. The Suspension Act, accordingly, does not appear to be applicable to them. These items have not been separately discussed by the parties, and are mentioned here to avoid the application of our general conclusions to them in the absence of further consideration.

[2] 18 U. S. C. (Supp. V) § 3287.

[3] 18 U. S. C. (Supp. V) § 3282.

[4] § 35 (A) of the Criminal Code, 52 Stat. 197, 18 U. S. C. § 80, now 18 U. S. C. (Supp. V) § 287.

ingly, wilfully and fraudulently" presented for payment to the Commodity Credit Corporation, at various times in 1945, claims upon that corporation certifying that appellee had made certain purchases of wool at certain prices, knowing such claims "to be false, fictitious and fraudulent . . . ." It charges, further, that appellee knowingly and falsely certified to the Commodity Credit Corporation that he had paid higher prices for the wool than he actually did.[5]

The indictment in No. 635 charges appellees Clavere and Kennedy, in 15 counts, with like offenses committed in 1946, including several claims based upon their false certifications of purchases of wool when they knew that they had made no such purchases.

The indictment in No. 636 charges appellees Clavere and Kennedy, in one count, with conspiring to make false, fictitious and fraudulent claims upon the Commodity Credit Corporation [6] by making somewhat comparable claims in 1946 and 1947. A second count charges appellees Clavere, Kennedy and Shapiro with engaging in a like conspiracy, with overt acts committed in 1946.[7]

Appellees moved to dismiss the indictments on the ground, among others, that each was barred by the applicable statute of limitations. The District Court granted the motions and dismissed the indictments. That

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[5] Commodity Credit Corporation was a Delaware corporation in which the United States was a stockholder. In 1945 and 1946 it served as an agency of the United States in making loans or purchases in connection with the expansion of the production of many commodities. 15 U. S. C. §§ 713–713a–9; 1 CFR, 1938, 659–678. See also, Commodity Credit Corporation Charter Act of June 29, 1948, 62 Stat. 1070, as amended, 15 U. S. C. (Supp. V) §§ 714–714*o*.

[6] § 37 of the Criminal Code, 35 Stat. 1096, 18 U. S. C. § 88, now 18 U. S. C. (Supp. V) § 371. See also, 52 Stat. 197, 18 U. S. C. § 83, now 18 U. S. C. (Supp. V) § 286.

[7] See note 1, *supra*.

court's unreported opinion concludes with the following statement:

> "Accordingly, the Court holds that, as to all three indictments, the three-year statute of limitations fixed by 18 USC section 582 and its successor, 18 USC [Supp. V] section [3282], applies. Because the statute that the various defendants are charged with having violated or with having conspired to violate does not 'denominate' the acts proscribed therein as 'frauds,' or does not, *in so many words*, have as an 'ingredient' a 'defrauding or an attempt to defraud the United States,' neither the Wartime Suspension of Limitations Act of 1942 nor its successor of 1948 can apply."

The United States appealed directly to this Court, under 18 U. S. C. (Supp. V) § 3731.*

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* "An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

"From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

. . . .

"From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy. . . ." 18 U. S. C. (Supp. V) § 3731.

In its notices of appeal, the United States said merely that it appealed from the several orders dismissing the respective indictments. In its combined statement of jurisdiction it relied upon its right to appeal from a judgment sustaining a motion in bar where the defendant has not been put in jeopardy. The Government, however, now suggests that its appeals are based upon the District Court's construction of the statutes upon which the indictments are founded and it seeks to restrict us to the consideration of the District Court's view of the relation between those statutes and the Suspension Act, without reference to the claim of appellees that the extension of time provided by the Suspension Act expired before the indictments were

1. *The running of the general three-year statute of limitations* [9] *was suspended by the Wartime Suspension of Limitations Act* [10] *as to violations, in 1945 and 1946, of the false claims clause of the False Claims Act.*[11]

A. While the offenses charged here are not spelled out in detail, they are sufficiently clear at least to show

found. We treat the appeals as presenting both issues. See *United States* v. *Borden Co.*, 308 U. S. 188; *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304. See also, *United States* v. *Hark*, 320 U. S. 531, 536; *United States* v. *Goldman*, 277 U. S. 229, 236–237; *United States* v. *Barber*, 219 U. S. 72, 78; and *United States* v. *Kissel*, 218 U. S. 601, 606.

[9] "Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within three years next after such offense shall have been committed." 18 U. S. C. (Supp. V) § 3282.

[10] "When the United States is at war the running of any statute of limitations applicable to any offense (1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not, or (2) committed in connection with the acquisition, care, handling, custody, control or disposition of any real or personal property of the United States, or (3) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancelation, or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the war, or with any disposition of termination inventory by any war contractor or Government agency, shall be suspended until three years after the termination of hostilities as proclaimed by the President or by a concurrent resolution of Congress." 18 U. S. C. (Supp. V) § 3287.

The above Act originated in 1942 and was amplified in 1944. In 1945 and 1946, it contained substantially the terms shown above which went into effect September 1, 1948. 56 Stat. 747–748, 58 Stat. 667, 781, 18 U. S. C. § 590a.

[11] 52 Stat. 197, 18 U. S. C. §§ 80, 83, 84, 85. In the codification of 1948, § 80 was subdivided by placing its false claims clause in § 287, and its false statement clause in § 1001, of 18 U. S. C. (Supp. V). The special conspiracy clause, found in § 83, became § 286 in Supp. V.

attempts to obtain payments from the Commodity Credit Corporation in amounts based upon knowingly false certifications to that corporation by the accused that certain purchases of wool had been made by him when he knew that no such purchases had been made by him or, at least, that no such purchases had been made by him at prices as high as those he certified that he paid. The offenses charged are, therefore, of a pecuniary nature and we are not required in these cases to pass upon the contention, discussed in the *Bridges* case, that, in order for the Suspension Act to apply to them, the offenses not only must involve defrauding the United States or an agency thereof, but they also must be of a pecuniary nature or of a nature concerning property.

B. The offenses with which we concern ourselves here are alleged to have occurred in 1945 or 1946. They, therefore, precede the President's proclamation of December 31, 1946, which declared that the hostilities of World War II terminated on that day.[12] The offenses thus come within the period to which the Suspension Act applies. *United States* v. *Smith*, 342 U. S. 225.

C. Fraud upon the United States is an essential ingredient of the offenses charged. The offenses charged in Cases No. 634 and No. 635 are violations of the *false claims clause*, as distinguished from the *false statement clause*, of the False Claims Act. Such false claims clause provides that—

> "Whoever shall . . . present . . . for payment or approval, to . . . any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States . . . or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent . . . shall

[12] 3 CFR, 1946 Supp., 77–78.

be fined not more than $10,000 or imprisoned not more than ten years, or both." 52 Stat. 197, 18 U. S. C. § 80, now 18 U. S. C. (Supp. V) § 287.

The indictments show that it is the false claims clause that is involved. And, what is more important to the issue here, the offense defined by that clause is the kind of offense at which the Suspension Act is directed.

The Suspension Act provides that—

"When the United States is at war the running of any statute of limitations applicable to any offense (1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not . . . shall be suspended until three years after the termination of hostilities as proclaimed by the President or by a concurrent resolution of Congress." 18 U. S. C. (Supp. V) § 3287.

In determining the kind of offenses to which that section applies, we have the benefit of the conclusion heretofore reached by this Court that such offenses are limited to those which include fraud as an essential ingredient.[13] The next question is what constitutes the required fraud. Our problem is simpler than in the *Bridges* case and in those cases which involve violations of the *false statement clause* of the False Claims Act. In those cases there is a question whether the mere making of a false statement in the connection specified necessarily includes the ingredient of fraud required by the Suspension Act. In the instant cases that question is not involved because the offenses include more than that. The substantive offenses here charged include the making of claims upon the Government for payments induced by knowingly false repre-

[13] *United States* v. *Scharton*, 285 U. S. 518; *United States* v. *McElvain*, 272 U. S. 633; *United States* v. *Noveck*, 271 U. S. 201.

sentations—constituting violations of the *false claims clause* of the False Claims Act. The statement of the offenses here carries with it the charge of inducing or attempting to induce the payment of a claim for money or property involving the element of deceit that is the earmark of fraud.[14] The false statement clause contains no such ingredient. The difference between the clauses is emphasized in the 1948 codification which has placed the former in § 287 and the latter in § 1001 of 18 U. S. C. (Supp. V).

We conclude that the Wartime Suspension of Limitations Act has added time within which to prosecute the wartime frauds involved in violations of the false claims clause of the False Claims Act.

Appellees have placed emphasis also upon the following statement by Mr. Justice Roberts, speaking for the Court, in *United States* v. *Scharton*, 285 U. S. 518, 521–522:

> "Moreover, the concluding clause of the section, though denominated a proviso, is an excepting clause and therefore to be narrowly construed. *United States* v. *McElvain*, 272 U. S. 633, 639. And as the section has to do with statutory crimes it is to be liberally interpreted in favor of repose, and ought not

[14] The *false statement clause* of the False Claims Act, which was involved in *Marzani* v. *United States*, 83 U. S. App. D. C. 78, 168 F. 2d 133, affirmed by an equally divided Court, 335 U. S. 895, 336 U. S. 922, provides merely that "whoever shall . . . make . . . any false or fraudulent statements or representations . . . in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder . . . shall be fined not more than $10,000 or imprisoned not more than ten years, or both." 52 Stat. 197, 18 U. S. C. § 80, now 18 U. S. C. (Supp. V) § 1001. Cases arising under that clause need not be discussed here and the references made in them to offenses arising generally under the False Claims Act should be read as referring to its false statement clause rather than to its false claims clause or to the Act as a whole.

to be extended by construction to embrace so-called frauds not so denominated by the statutes creating offenses."

Appellees argue that this language limits the Suspension Act not merely to those offenses in which fraud upon the United States is an essential ingredient, but to such of those offenses as Congress has "denominated" as "frauds" by using that very word or, at least, one of its derivatives.

We believe that Congress sought by its phrase "involving fraud . . . in any manner" [15] to make the Suspension Act applicable to offenses which are fairly identifiable as those in which fraud is an essential ingredient, by whatever words they be defined, and that Congress did not seek to limit its applicability to such of those identifiable offenses as also are labeled with a particular symbol. In the false claims clause of the False Claims Act, Congress met the requirement by identifying the offense as that of making "any claim upon . . . the United States . . . knowing such claim to be false, fictitious, or fraudulent . . . ." [16] The combination of either falsity, fiction or fraud with the claim is enough. The same reasoning applies to a conspiracy to make false claims, as alleged in No. 636.

2. *The Wartime Suspension of Limitations Act extended the time for finding the indictments through 1952.*

A. The Suspension Act had the effect of extending through 1952 the time for the prosecution of the offenses to which it applied.

When enacted August 24, 1942, during the first year of World War II, it provided for the inception and expira-

[15] 18 U. S. C. (Supp. V) § 3287.

[16] 52 Stat. 197.

tion of its effect on existing statutes of limitations as follows:

> ". . . *the running of any existing statute* of limitations applicable to offenses involving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, and now indictable under any existing statutes, *shall be suspended until June 30, 1945, or until such earlier time* as the Congress by concurrent resolution, or the President, may designate. . . ." (Emphasis supplied.) 56 Stat. 747–748.

There is no doubt as to the meaning of the word "running" in that enactment. The running of any existing statute of limitations simply was to be suspended until June 30, 1945—that is, for about three years—unless such suspension was cut short by Congress or the President. The obvious purpose was to add about three years (or a shorter wartime period) to the time otherwise available for the prosecution of certain wartime frauds.

The present difficulty was introduced by the amendment of July 1, 1944. It added not only specific language as to war contracts but it changed the expiration clause to read—

> "*The running of any existing statute of limitations* applicable to any offense . . . (1) involving defrauding . . . the United States . . . or (2) committed in connection with the . . . performance . . . of any contract . . . related to the prosecution of the present war . . . *shall be suspended until three years after the termination of hostilities in the present war as proclaimed by the President or by a concurrent resolution of the two Houses of Congress.* . . ." (Emphasis supplied.) 58 Stat. 667.

The effect of this language, when read with the Act of 1942, is inescapable. The phrase as to "running of any existing statute of limitations" remains precisely as it was in 1942, but the expiration date of the suspension is changed from June 30, 1945 (or an earlier date to be designated by Congress or the President), to a new date. The new date is not fixed as one to come three years later. It is made a movable date which can occur only three years *after* the date of the termination of hostilities as proclaimed by the President or Congress. Under the 1942 Act, the running of the general three-year statute was suspended for three years or less. Under the 1944 amendment, the running is just as clearly suspended until three years has expired *after* the termination of hostilities.

The precise language of the July 1, 1944, amendment was reenacted October 3, 1944, when a clause was added dealing with offenses connected with the handling of property under the Surplus Property Act of 1944, 58 Stat. 781. The language was then carried into 18 U. S. C. § 590a.

When the President, December 31, 1946, proclaimed the termination of hostilities of World War II, 3 CFR, 1946 Supp., 77–78, this automatically caused the resumption of the running of statutes of limitations on December 31, 1949. Accordingly, in relation to the instant offenses committed in 1945 and 1946, during the period of suspension, the general three-year limitation prescribed by 18 U. S. C. (Supp. V) § 3282 began to run for the first time on January 1, 1950, and expired December 31, 1952.

United States v. *Smith*, 342 U. S. 225, held that the offenses to which the Suspension Act applied were only those actually committed *before* the termination of hostilities December 31, 1946. The length of the period for their prosecution was not there in controversy because the offenses occurred in 1947. That period, however, was

mentioned either directly or by implication in the concurring and dissenting opinions published on behalf of a majority of the members of the Court. The following statement was made in the concurring opinion:

> "These cases clearly illustrate that the suspension statute was not intended to and should not embrace offenses committed subsequent to December 31, 1946. It applies only to offenses committed between August 25, 1939, and December 31, 1946. For those offenses which occurred between the date of the 1942 Act and the cessation of hostilities, Congress' intention was to give the Department of Justice six years from the latter date to investigate and prosecute. For those offenses which occurred before the date of the 1942 Act, Congress' intention was to give the Department three years after the cessation of hostilities plus whatever portion of the regular three-year limitations' period had not yet run when the 1942 Act was passed." P. 231.

This issue was before the Court in No. 527, *United States* v. *Klinger*, which this day is affirmed by an evenly divided Court, 345 U. S. 979. In that case, however, there was presented not only this issue but also an issue as to whether the offense charged was one involving fraud of a pecuniary nature upon the United States.

B. The codification of the Criminal Code, June 25, 1948, effective September 1, 1948, did not change the situation. It repealed the Suspension Act, as amended October 3, 1944, by reference to it as § 28 of Chapter 479, 58 Stat. 781, and as 18 U. S. C. § 590a. 62 Stat. 862, 868. At the same time, Congress substantially reenacted the Suspension Act as 18 U. S. C. (Supp. V) § 3287. 62 Stat. 828. The appellees point out that the saving clause in § 21 of the Act of June 25, 1948, 62 Stat. 862, saves only substantive rights and liabilities then existing under the

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repealed sections. They suggest also that any extended periods of limitation resulting from the Suspension Act were thus repealed as of September 1, 1948, leaving applicable the general three-year statute of limitations which would terminate the period for prosecution September 1, 1951. We do not agree with that suggestion. The reenactment of the Suspension Act as § 3287, June 25, 1948, effective September 1, 1948, like the reenactment of the general three-year statute of limitations as § 3282, carried with it the purpose of the codification. That purpose makes §§ 3287 and 3282 applicable not merely prospectively to subsequent offenses, but forthwith to existing offenses in the same manner and with the same effect as if the reenacted provisions had remained continuously in effect in their substantially identical precodification form. Codification contemplates, implies and produces continuity of existing law in clarified form rather than its interruption.

The motions to dismiss the indictments should have been denied. The judgment of the District Court therefore is reversed and the cause is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

MR. JUSTICE BLACK, MR. JUSTICE FRANKFURTER and MR. JUSTICE DOUGLAS, adopting the reasoning in the opinion of Judge Learned Hand in *United States* v. *Klinger*, 199 F. 2d 645, would affirm the District Court in dismissing these indictments.

MR. JUSTICE JACKSON took no part in the consideration or decision of this case.

BARROWS ET AL. v. JACKSON.

CERTIORARI TO THE DISTRICT COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT.

No. 517. Argued April 28–29, 1953.—Decided June 15, 1953.

The enforcement of a covenant forbidding use and occupancy of real estate by non-Caucasians, by an action at law in a state court to recover damages from a co-covenantor for a breach of the covenant, is barred by the Fourteenth Amendment of the Federal Constitution. Pp. 251–260.

(a) The action of a state court in thus sanctioning a racial restrictive covenant would constitute state action within the prohibition of the Fourteenth Amendment. P. 254.

(b) State action in allowing damages for breach of a covenant not to permit non-Caucasians to use and occupy their property would deprive such non-Caucasians, unidentified but identifiable, of equal protection of the laws in violation of the Fourteenth Amendment. P. 254.

(c) The principle that a person cannot challenge the constitutionality of a statute unless he shows that he himself is injured by its operation has no application to the instant case, in which respondent has been sued for damages totaling $11,600, and in which a judgment against respondent would constitute a direct pocketbook injury to her. Pp. 254–256.

(d) Under the peculiar circumstances of this case, the reasons which underlie the rule denying standing to raise another's constitutional rights, which is only a rule of practice, are outweighed by the need to protect the fundamental rights which would be denied by permitting the damages action to be maintained. P. 257.

(e) The principle that the right to equal protection of the laws is a "personal" right, guaranteed to the individual rather than to groups or classes, is not here violated, since it is not non-Caucasians as a group whose rights are asserted by the defendant in the damages action, but the rights of particular non-Caucasian would-be users of restricted land. Pp. 250–260.

(f) The provision of Art. I, § 10 of the Federal Constitution, that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts," is not violated by the refusal of a state court

to enforce a racial restrictive covenant, since that provision is directed against legislative action only, not against the judgments of courts. P. 260.

(g) The plaintiffs in an action for damages for breach of a racial restrictive covenant are not denied due process and equal protection of the laws by the state court's refusal to enforce the covenant, since the Constitution confers upon no individual the right to demand action by the State which would result in the denial of equal protection of the laws to others. P. 260.

112 Cal. App. 2d 534, 247 P. 2d 99, affirmed.

Petitioners sued respondent in a California state court to recover damages for an alleged breach of a racial restrictive covenant. The trial court sustained a demurrer to the complaint. The District Court of Appeal affirmed. 112 Cal. App. 2d 534, 247 P. 2d 99. The State Supreme Court denied a hearing. This Court granted certiorari. 345 U. S. 902. *Affirmed*, p. 260.

J. Wallace McKnight argued the cause for petitioners. With him on the brief were *John C. Miles* and *Charles Leland Bagley*.

Loren Miller argued the cause for respondent. With him on the brief were *Thurgood Marshall* and *Franklin H. Williams*.

Briefs of *amici curiae* urging reversal were filed by *John W. Preston* for Affiliated Neighbors et al.; and *Walter H. Pollmann, Gerald L. Seegers* and *Paul M. Gerwitz, Jr.* for O'Fallon Park Protective Association et al.

Briefs of *amici curiae* urging affirmance were filed by *A. L. Wirin* for the American Civil Liberties Union (Southern California Branch); by *Fred Okrand* for the Greater Los Angeles C. I. O. Council, *Saburo Kido* for the Japanese American Citizens' League, and *David Ziskind* for the Los Angeles Urban League et al.; by *Phineas Indritz* for the American Veterans Committee, Inc.; by *Arnold Forster, Harry Graham Balter, Mr. Zis-*

kind and *Theodore Leskes* for the American Jewish Committee et al.; and by *Irving Kane, Lewis H. Weinstein, Will Maslow, Leo Pfeffer* and *Joseph B. Robison* for the National Community Relations Advisory Council.

MR. JUSTICE MINTON delivered the opinion of the Court.

This Court held in *Shelley* v. *Kraemer*, 334 U. S. 1, that racial restrictive covenants could not be enforced in equity against Negro purchasers because such enforcement would constitute state action denying equal protection of the laws to the Negroes, in violation of the Fourteenth Amendment to the Federal Constitution. The question we now have is: Can such a restrictive covenant be enforced at law by a suit for damages against a co-covenantor who allegedly broke the covenant?

Petitioners[1] sued respondent at law for damages for breach of a restrictive covenant the parties entered into as owners of residential real estate in the same neighborhood in Los Angeles, California. The petitioners' complaint alleged in part:

> "That by the terms of said Agreement each of the signers promised and agreed in writing and bound himself, his heirs, executors, administrators, successors, and assigns, by a continuing covenant that no part of his said real property, described therein, should ever at any time be used or occupied by any person or persons not wholly of the white or Caucasian race, and also agreed and promised in writing that this restriction should be incorporated in all papers and transfers of lots or parcels of land hereinabove referred to; provided, however, that said restrictions should not prevent the employment by

[1] Petitioner Pikaar was not a signer of the covenant but is successor in interest of a signer.

> the owners or tenants of said real property of domestic servants or other employees who are not wholly of the white or Caucasian race; provided, further, however, that such employees shall be permitted to occupy said real property only when actively engaged in such employment. That said Agreement was agreed to be a covenant running with the land. That each provision in said Agreement was for the benefit for all the lots therein described."

The complaint further alleged that respondent broke the covenant in two respects: (1) by conveying her real estate without incorporating in the deed the restriction contained in the covenant; and (2) by permitting non-Caucasians to move in and occupy the premises. The trial court sustained a demurrer to the complaint, the District Court of Appeal for the Second Appellate District affirmed, 112 Cal. App. 2d 534, 247 P. 2d 99, and the Supreme Court of California denied hearing. We granted certiorari, 345 U. S. 902, because of the importance of the constitutional question involved and to consider the conflict which has arisen in the decisions of the state courts since our ruling in the *Shelley* case, *supra*. Like the California court in the instant case, the Supreme Court of Michigan sustained the dismissal of a claim for damages for breach of a racial restrictive covenant, *Phillips* v. *Naff*, 332 Mich. 389, 52 N. W. 2d 158. See also *Roberts* v. *Curtis*, 93 F. Supp. 604 (Dist. Col.). The Supreme Court of Missouri reached a contrary result, *Weiss* v. *Leaon*, 359 Mo. 1054, 225 S. W. 2d 127, while the Supreme Court of Oklahoma has held that a claim for damages may be maintained against a white seller, an intermediate straw man, and a non-Caucasian purchaser for a conspiracy to violate the covenant, *Correll* v. *Earley*, 205 Okla. 366, 237 P. 2d 1017.

The trial court in the case here held that a party to a covenant restricting use and occupancy [4] of real estate to Caucasians could not maintain a suit at law against a co-covenantor for breach of the covenant because of our ruling in *Shelley, supra*. In *Shelley*, this Court held that the action of the lower courts in granting equitable relief in the enforcement of such covenants constituted state action denying to Negroes, against whom the covenant was sought to be enforced, equal protection of the laws in violation of the Fourteenth Amendment. This Court said:

> "We conclude, therefore, that the restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated. . . ." 334 U. S. 1, 13.

That is to say, the law applicable in that case did not make the covenant itself invalid, no one would be punished for making it, and no one's constitutional rights were violated by the covenantor's voluntary adherence thereto. Such voluntary adherence would constitute individual action only. When, however, the parties cease to rely upon voluntary action to carry out the covenant and the State is asked to step in and give its sanction to the enforcement of the covenant, the first question

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[4] There is no question of restraint of *sale* here, as agreements restraining sale of land to members of defined racial groups have long been held unenforceable in California because they contravened the State's statutory rule and public policy against restraints on alienation. *Wayt* v. *Patee*, 205 Cal. 46, 269 P. 660; *Title Guarantee & Trust Co.* v. *Garrott*, 42 Cal. App. 152, 183 P. 470.

that arises is whether a court's awarding damages constitutes state action under the Fourteenth Amendment. To compel respondent to respond in damages would be for the State to punish her for her failure to perform her covenant to continue to discriminate against non-Caucasians in the use of her property. The result of that sanction by the State would be to encourage the use of restrictive covenants. To that extent, the State would act to put its sanction behind the covenants. If the State may thus punish respondent for her failure to carry out her covenant, she is coerced to continue to use her property in a discriminatory manner, which in essence is the purpose of the covenant. Thus, it becomes not respondent's voluntary choice but the State's choice that she observe her covenant or suffer damages. The action of a state court at law to sanction the validity of the restrictive covenant here involved would constitute state action as surely as it was state action to enforce such covenants in equity, as in *Shelley, supra.*

The next question to emerge is whether the state action in allowing damages deprives anyone of rights protected by the Constitution. If a state court awards damages for breach of a restrictive covenant, a prospective seller of restricted land will either refuse to sell to non-Caucasians or else will require non-Caucasians to pay a higher price to meet the damages which the seller may incur. Solely because of their race, non-Caucasians will be unable to purchase, own, and enjoy property on the same terms as Caucasians. Denial of this right by state action deprives such non-Caucasians, unidentified but identifiable, of equal protection of the laws in violation of the Fourteenth Amendment. See *Shelley, supra.*

But unlike *Shelley, supra,* no non-Caucasian is before the Court claiming to have been denied his constitutional rights. May respondent, whom petitioners seek to coerce by an action to pay damages for her failure to honor her

restrictive covenant, rely on the invasion of the rights of others in her defense to this action?

Ordinarily, one may not claim standing in this Court to vindicate the constitutional rights of some third party. Reference to this rule is made in varied situations. See *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U. S. 123, 149–154 (concurring opinion). The requirement of standing is often used to describe the constitutional limitation on the jurisdiction of this Court to "cases" and "controversies." See *Coleman* v. *Miller*, 307 U. S. 433, 464 (concurring opinion). Apart from the jurisdictional requirement, this Court has developed a complementary rule of self-restraint for its own governance (not always clearly distinguished from the constitutional limitation) which ordinarily precludes a person from challenging the constitutionality of state action by invoking the rights of others. See *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 346–348 (concurring opinion). The common thread underlying both requirements is that a person cannot challenge the constitutionality of a statute unless he shows that he himself is injured by its operation.[3] This principle has no application to the instant

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[3] See *Frothingham* v. *Mellon*, 262 U. S. 447, 486–489 (federal taxpayer sought to challenge a federal statute in the enforcement of which federal revenues were applied); *Doremus* v. *Board of Education*, 342 U. S. 429, 434 (state taxpayer unable to show that there was "a measurable appropriation or disbursement of . . . funds occasioned solely by the [state] activities complained of"); *Tileston* v. *Ullman*, 318 U. S. 44 (doctor sought a declaratory judgment that a state statute would deprive certain of his *patients* of their lives without due process of law); *Tyler* v. *Judges of the Court of Registration*, 179 U. S. 405, 410 (landowner sought to challenge the notice provisions for a land registration proceeding in which he had not made himself a party, although he had notice of the proceedings, and even though "his interest in the land would remain unaffected" if the act were subsequently declared unconstitutional); *Gange Lumber Co.* v. *Rowley*, 326 U. S. 295; *Alabama Power Co.* v. *Ickes*, 302 U. S. 464,

case in which respondent has been sued for damages totaling $11,600, and in which a judgment against respondent would constitute a direct, pocketbook injury to her.

There are still other cases in which the Court has held that even though a party will suffer a direct substantial injury from application of a statute, he cannot challenge its constitutionality unless he can show that he is within the class whose constitutional rights are allegedly infringed. *Bode* v. *Barrett*, 344 U. S. 583, 585; *Jeffrey Mfg. Co.* v. *Blagg*, 235 U. S. 571, 576; *New York ex rel. Hatch* v. *Reardon*, 204 U. S. 152, 160–161; see also *Tennessee Elec. Power Co.* v. *Tennessee Valley Authority*, 306 U. S. 118, 144.[4] One reason for this ruling is that the state court, when actually faced with the question, might narrowly construe the statute to obliterate the objectionable feature, or it might declare the unconstitutional provisions separable. *New York ex rel. Hatch* v. *Reardon, supra*, at 160–161; *Wuchter* v. *Pizzutti*, 276 U. S. 13, 26–28 (dissenting opinion). It would indeed be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation. Nor are we so ready to frustrate the expressed will of Congress or that

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478–480; cf. *McCabe* v. *Atchison, T. & S. F. R. Co.*, 235 U. S. 151, 162–164 (four Negroes who sought to enjoin enforcement of discriminatory state action denied relief on the ground that they failed to allege that they themselves had suffered, or were about to suffer, discriminatory treatment for which there was no adequate remedy at law). And compare *Doremus* v. *Board of Education, supra*, with *Illinois ex rel. McCollum* v. *Board of Education*, 333 U. S. 203, 206, 234.

[4] Cf. *Goldstein* v. *United States*, 316 U. S. 114; *Hale* v. *Henkel*, 201 U. S. 43, 69–70, and the lower court cases which restrict to the person whose premises were invaded the right to have illegally-seized evidence excluded. The rights in these cases are obviously closely linked to the person of the individual.

of the state legislatures. Cf. *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167, 172.

This is a salutary rule, the validity of which we reaffirm. But in the instant case, we are faced with a unique situation in which it is the action of the state *court* which might result in a denial of constitutional rights and in which it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court. Under the peculiar circumstances of this case, we believe the reasons which underlie our rule denying standing to raise another's rights, which is only a rule of practice, are outweighed by the need to protect the fundamental rights which would be denied by permitting the damages action to be maintained. Cf. *Quong Ham Wah Co.* v. *Industrial Acc. Comm'n*, 184 Cal. 26, 192 P. 1021.

In other unique situations which have arisen in the past, broad constitutional policy has led the Court to proceed without regard to its usual rule. In *Pierce* v. *Society of Sisters*, 268 U. S. 510, a state statute required all parents (with certain immaterial exceptions) to send their children to public schools. A private and a parochial school brought suit to enjoin enforcement of the act on the ground that it violated the constitutional rights of parents and guardians. No parent or guardian to whom the act applied was a party or before the Court. The Court held that the act was unconstitutional because it "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control." *Pierce* v. *Society of Sisters*, *supra*, at 534–535. In short, the schools were permitted to assert in defense of their property rights the constitutional rights of the parents and guardians. See also *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, *supra*, at 141, 153–154; *Columbia Broadcasting System* v. *United States*, 316 U. S. 407, 422–423; *Helvering* v.

Gerhardt, 304 U. S. 405; *Truax* v. *Raich*, 239 U. S. 33; *United States* v. *Railroad Co.*, 17 Wall. 322; *Quong Ham Wah Co.* v. *Industrial Acc. Comm'n*, *supra*; cf. *United States* v. *Jeffers*, 342 U. S. 48, 52; *Federal Communications Comm'n* v. *Sanders Brothers Radio Station*, 309 U. S. 470; *Wuchter* v. *Pizzutti*, *supra*.

There is such a close relationship between the restrictive covenant here and the sanction of a state court which would punish respondent for not going forward with her covenant, and the purpose of the covenant itself, that relaxation of the rule is called for here. It sufficiently appears that mulcting in damages of respondent will be solely for the purpose of giving vitality to the restrictive covenant, that is to say, to punish respondent for not continuing to discriminate against non-Caucasians in the use of her property. This Court will not permit or require California to coerce respondent to respond in damages for failure to observe a restrictive covenant that this Court would deny California the right to enforce in equity, *Shelley*, *supra*; or that this Court would deny California the right to incorporate in a statute, *Buchanan* v. *Warley*, 245 U. S. 60; or that could not be enforced in a federal jurisdiction because such a covenant would be contrary to public policy:

> "It is not consistent with the public policy of the United States to permit federal courts in the Nation's capital to exercise general equitable powers to compel action denied the state courts where such state action has been held to be violative of the guaranty of the equal protection of the laws. We cannot presume that the public policy of the United States manifests a lesser concern for the protection of such basic rights against discriminatory action of federal courts than against such action taken by the courts of the States." *Hurd* v. *Hodge*, 334 U. S. 24, 35–36. See also *Roberts* v. *Curtis*, *supra*.

Consistency in the application of the rules of practice in this Court does not require us in this unique set of circumstances to put the State in such an equivocal position simply because the person against whom the injury is directed is not before the Court to speak for himself. The law will permit respondent to resist any effort to compel her to observe such a covenant, so widely condemned by the courts, since she is the one in whose charge and keeping reposes the power to continue to use her property to discriminate or to discontinue such use. The relation between the coercion exerted on respondent and her possible pecuniary loss thereby is so close to the purpose of the restrictive covenant, to violate the constitutional rights of those discriminated against, that respondent is the only effective adversary of the unworthy covenant in its last stand. She will be permitted to protect herself and, by so doing, close the gap to the use of this covenant, so universally condemned by the courts.

Petitioners argue that the right to equal protection of the laws is a "personal" right, guaranteed to the individual rather than to groups or classes. For instance, discriminatory denial of sleeping-car and dining-car facilities to an individual Negro cannot be justified on the ground that there is little demand for such facilities by Negroes as a group. *McCabe* v. *Atchison, T. & S. F. R. Co.*, 235 U. S. 151, 161–162. See *Sweatt* v. *Painter*, 339 U. S. 629, 635. This description of the right as "personal," when considered in the context in which it has been used, obviously has no bearing on the question of standing. Nor do we violate this principle by protecting the rights of persons not identified in this record. For instance, in the *Pierce* case, the persons whose rights were invoked were identified only as "present and prospective patrons" of the two schools. *Pierce* v. *Society of Sisters, supra*, at 535. In the present case, it is not non-Cauca-

sians as a group whose rights are asserted by respondent, but the rights of particular non-Caucasian would-be users of restricted land.

It is contended by petitioners that for California courts to refuse to enforce this covenant is to impair the obligation of their contracts. Article I, § 10, of the Federal Constitution provides: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ." The short answer to this contention is that this provision, as its terms indicate, is directed against legislative action only.

> "It has been settled by a long line of decisions, that the provision of § 10, Article I, of the Federal Constitution, protecting the obligation of contracts against state action, is directed only against impairment by legislation and not by judgments of courts. . . ." *Tidal Oil Co.* v. *Flanagan*, 263 U. S. 444, 451.

It is finally contended that petitioners are denied due process and equal protection of the laws by the failure to enforce the covenant. The answer to that proposition is stated by the Court in *Shelley*, *supra*, in these words:

> "The Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals. . . ." 334 U. S. 1, 22.

The judgment is

Affirmed.

MR. JUSTICE REED and MR. JUSTICE JACKSON took no part in the consideration or decision of this case.

MR. CHIEF JUSTICE VINSON, dissenting.

This case, we are told, is "unique." I agree with the characterization. The Court, by a unique species of

arguments, has developed a unique exception to an otherwise easily understood doctrine. While I may hope that the majority's use of "unique" is but another way of saying that the decision today will be relegated to its precise facts tomorrow, I must voice my dissent.

The majority seems to recognize, albeit ignores, a proposition which I thought was made plain in the *Shelley* case.[1] That proposition is this: these racial restrictive covenants, whatever we may think of them, are not legal nullities so far as any doctrine of federal law is concerned; it is not unlawful to make them; it is not unlawful to enforce them unless the method by which they are enforced in some way contravenes the Federal Constitution or a federal statute.

Thus, in the *Shelley* case, it was not the covenants which were struck down but judicial enforcement of them against Negro vendees. The question which we decided was simply whether a state court could decree the ouster of Negroes from property which they had purchased and which they were enjoying. We held that it could not. We held that such judicial action, which operated directly against the Negro petitioners and deprived them of their right to enjoy their property solely because of their race, was state action and constituted a denial of "equal protection."[2]

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[1] *Shelley* v. *Kraemer*, 334 U. S. 1 (1948).

[2] The state action which we struck down was epitomized in this language, 334 U. S., at 19:

"We have no doubt that there has been state action in these cases in the full and complete sense of the phrase. The undisputed facts disclose that petitioners were willing purchasers of properties upon which they desired to establish homes. The owners of the properties were willing sellers; and contracts of sale were accordingly consummated. It is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners

This case is different.

The majority identifies no non-Caucasian who has been injured or could be injured if damages are assessed against respondent for breaching the promise which she willingly and voluntarily made to petitioners, a promise which neither the federal law nor the Constitution proscribes. Indeed, the non-Caucasian occupants of the property involved in this case will continue their occupancy undisturbed, regardless of the outcome of the suit. The state court was asked to do nothing which would impair their rights or their enjoyment of the property.

The plain, admitted fact that there is no identifiable non-Caucasian before this Court who will be denied any right to buy, occupy or otherwise enjoy the properties involved in this lawsuit, or any other particular properties, is decisive to me. It means that the constitutional defect, present in the *Shelley* case, is removed from this case. It means that this Court has no power to deal with the constitutional issue which respondent seeks to inject in this litigation as a defense to her breach of contract. It means that the covenant, valid on its face, can be enforced between the parties—unless California law or California policy forbids its enforcement—without running afoul of any doctrine ever promulgated by this Court, without any interference from this Court.

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would have been free to occupy the properties in question without restraint.

"These are not cases, as has been suggested, in which the States have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit. Rather, these are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell. . . ."

I turn, first, to the matter of our power to decide this case. The majority states the issue:

> ". . . May respondent, whom petitioners seek to coerce by an action to pay damages for her failure to honor her restrictive covenant, rely on the invasion of the rights of others in her defense to this action?"

Logically this issue should be met where such an issue is usually met—at the "threshold";[3] this decision should precede any discussion of the merits of respondent's constitutional claim. Yet it is not amiss to point out that the majority has failed to put first things first; it decides the merits and then, comforted by its decision on the merits, resolves its doubts that it has power to decide the merits.

A line of decisions—long enough to warrant the respect of even the most hardened skeptic of the strength of *stare decisis* as an effective limitation upon this Court's exercise of jurisdiction in constitutional cases—establishes the principle[4] which should stay this Court from deciding

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[3] Compare *Montgomery Building & Construction Trades Council* v. *Ledbetter Erection Co.*, 344 U. S. 178, 179 (1952); *United Public Workers* v. *Mitchell*, 330 U. S. 75, 86 (1947).

[4] The principle derives, of course, from the nature of the judicial power conferred by Art. III of the Constitution. At a very early stage in this Court's history, Mr. Chief Justice Marshall put the matter thus:

". . . The article does not extend the judicial power to every violation of the constitution which may possibly take place, but to 'a case in law or equity,' in which a right, under such law, is asserted in a Court of justice. If the question cannot be brought into a Court, then there is no case in law or equity, and no jurisdiction is given by the words of the article. . . ." *Cohens* v. *Virginia*, 6 Wheat. 264, 405 (1821).

And see the discussion of this principle and its ramifications in Mr. Justice Brandeis' concurring opinion in *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 341 (1936).

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what it decides today—from doing what it does today—from imposing a novel constitutional limitation upon the power of the courts of the several states to enforce their own contract laws as they choose. This deep-rooted, vital doctrine demands that the Court refrain from deciding a constitutional issue until it has a party before it who has standing to raise the issue.[5] The majority agrees that this is a "salutary" principle, and supplies us with but a small sampling of the cases to show that it has been rigorously applied in many varied situations, and surely no sophistry is required to apply it to this case. Accordingly, respondent must show, at the outset, that she, herself, and not some unnamed person in an

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[5] MR. JUSTICE FRANKFURTER, concurring in *Coleman* v. *Miller*, 307 U. S. 433, 460 (1939), sets forth the basis of the principle which I believe the Court has failed to observe today:

"In endowing this Court with 'judicial Power' the Constitution presupposed an historic content for that phrase and relied on assumption by the judiciary of authority only over issues which are appropriate for disposition by judges. . . .

. . . . . .

". . . It is our ultimate responsibility to determine who may invoke our judgment and under what circumstances. . . . The scope and consequences of our doctrine of judicial review over executive and legislative action should make us observe fastidiously the bounds of the litigious process within which we are confined. No matter how seriously infringement of the Constitution may be called into question, this is not the tribunal for its challenge except by those who have some specialized interest of their own to vindicate, apart from a political concern which belongs to all. *Stearns* v. *Wood*, 236 U. S. 75; *Fairchild* v. *Hughes*, 258 U. S. 126.

. . . . . .

"We can only adjudicate an issue as to which there is a claimant before us who has a special, individualized stake in it. One who is merely the self-constituted spokesman of a constitutional point of view can not ask us to pass on it. . . ."

amorphous class, is the victim of the unconstitutional discrimination of which she complains.[6]

Respondent makes no such showing. She does not ask the Court to protect her own constitutional rights, nor even the rights of the persons who now occupy her property. Instead, she asks the Court to protect the rights of those non-Caucasians—whoever they may be—who might, at some point, be prospective vendees of some other property encumbered by some other similar covenant. Had respondent failed to designate herself as the agent of this anonymous, amorphous class, the majority certainly would have no power to vindicate its rights. Yet, because respondent happens to have decided to act as the self-appointed agent of these principals whom she cannot identify—in order to relieve herself of the obligations of her own covenant—the majority finds itself able to assert

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[6] *Tyler* v. *Judges of the Court of Registration*, 179 U. S. 405 (1900), while not the first, is generally cited as the leading case on this aspect of the rules governing our exercise of jurisdiction. The Court said:

"The prime object of all litigation is to establish a right asserted by the plaintiff or to sustain a defence set up by the party pursued. Save in a few instances where, by statute or the settled practice of the courts, the plaintiff is permitted to sue for the benefit of another, he is bound to show an interest in the suit personal to himself, and even in a proceeding which he prosecutes for the benefit of the public, as, for example, in cases of nuisance, he must generally aver an injury peculiar to himself, as distinguished from the great body of his fellow citizens." 179 U. S., at 406.

This historic view has been voiced again and again and applied in various situations down through the decades. See, *e. g.*, *Lampasas* v. *Bell*, 180 U. S. 276 (1901); *Cronin* v. *Adams*, 192 U. S. 108 (1904); *The Winnebago*, 205 U. S. 354 (1907); *Rosenthal* v. *New York*, 226 U. S. 260 (1912); *McCabe* v. *Atchison, T. & S. F. R. Co.*, 235 U. S. 151 (1914); *Jeffrey Manufacturing Co.* v. *Blagg*, 235 U. S. 571 (1915); *Sprout* v. *City of South Bend*, 277 U. S. 163 (1928); *Tileston* v. *Ullman*, 318 U. S. 44 (1943); *Gange Lumber Co.* v. *Rowley*, 326 U. S. 295 (1945); *Bode* v. *Barrett*, 344 U. S. 583 (1953).

the power over state courts which it asserts today. I do not think that such tenuous circumstances can spawn the broad constitutional limitation upon state courts which springs from today's decision.[7]

Yet we are told that the rule which restricts our power to impose this constitutional limitation is but a rule of "self-restraint." So is every other jurisdictional limitation which depends, in the last analysis, solely upon this Court's willingness to govern its own exercise of power. And certainly to characterize the rule as self-imposed does not mean that it is self-removable by a simple self-serving process of argument. Yet the majority's logic, reduced to its barest outlines, seems to proceed in that fashion. We are told that the reasons for the self-imposed rule, which precludes us from reaching the merits, have been dissipated in this case, but the only reason why the reasons do not exist is because the Court first holds for respondent, and, having thus decided the merits, it feels free to abandon the rule which should preclude it from reaching the merits. In my view, respondent can-

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[7] Similarly, I think that respondent's reliance, in her brief, on *Buchanan* v. *Warley*, 245 U. S. 60 (1917), as a precedent to show that she has met the minimum requirements on standing, is misplaced. In that case, a white vendor attacked a zoning ordinance which prohibited the sale of his property to any Negroes. The Court held he had standing to attack the ordinance since his constitutional attack was founded on the theory that the ordinance unconstitutionally abridged *his* right to sell his property to any willing purchaser, and not on the theory that it abridged the Negro vendee's right to buy property without being subject to discrimination by the state. The Court then held the statute invalid as an unreasonable classification.

Similarly, in *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925), upon which the majority relies, a private school challenged a state law forbidding private education on the theory that the statute unreasonably abridged *its* (the school's) property rights. It was the assertion of the school's property rights which the Court considered in determining the validity of the statute.

not surmount the hurdle of our well-established rule by proceeding with an argument which carries her in a circle right back to her precise point of departure. If it should be, as the majority assumes, that there is no other way that the rights of unidentified non-Caucasians can be vindicated in court, that is only an admission that there is no way in which a substantial case or controversy can be predicated upon the right which the majority is so anxious to pass upon. I cannot assent to a manner of vindicating the constitutional rights of persons unknown which puts personal predisposition in a paramount position over well-established proscriptions on power.

But even if the merits are to be reached, even if we must decide whether enforcement of this covenant in a lawsuit of this kind is state action which contravenes the Fourteenth Amendment, I think that the absence of any direct injury to any identifiable non-Caucasian is decisive. The *Shelley* case, resting on the express determination that restrictive covenants are valid between the parties, dealt only with a state court's attempt to enforce them directly against innocent third parties whose right to enjoy their property would suffer immediate harm.

In this case, the plaintiffs have not sought such relief. The suit is directed against the very person whose solemn promise helped to bring the covenant into existence. The plaintiffs ask only that respondent do what she in turn had a right to ask of plaintiffs—indemnify plaintiffs for the bringing about of an event which she recognized would cause injury to the plaintiffs. We need not concern ourselves now with any question of whether this injury is fancied or real. The short of that matter is that the parties thought that any influx of non-Caucasian neighbors would impair their enjoyment of their properties, and, whether right or wrong, each had the right to control the use of his property against that event and to exact a promise from his or her neighbor that he or

she would act accordingly. And that is precisely what petitioners and respondent did. Moreover, we must, at this pleading stage of the case, accept it as a fact that respondent has thus far profited from the execution of this bargain; observance of the covenant by petitioners raised the value of respondent's properties. By this suit, the plaintiffs sought only to have respondent disgorge that which was gained at the expense of depreciation in her neighbors' property.

The majority speaks of this as an attempt to "coerce" respondent to continue to abide by her agreement. Yet the contract has already been breached. The non-Caucasians are in undisturbed occupancy. Furthermore, the respondent consented to the "coercion"—if "coercion" there be—by entering into the covenant. Plaintiffs ask only that respondent now pay what she legally obligated herself to pay for an injury which she recognized would occur if she did what she did.

Of course, there may be other elements of coercion. Coercion might result on the minds of some Caucasian property owners who have signed a covenant such as this, for they may now feel an economic compulsion to abide by their agreements. But visiting coercion upon the minds of some unidentified Caucasian property owners is not at all the state action which was condemned in the *Shelley* case. In that case, the state court had directed "the full coercive power of government" against the Negro petitioners—forcefully removing them from their property because they fell in a class discriminatorily defined. But in this case, where no identifiable third person can be directly injured if respondent is made to disgorge enough to indemnify petitioners, the Court should not undertake to hold that the Fourteenth Amendment stands as a bar to the state court's enforcement of its contract law.

Obviously we can only interfere in this case if the Fourteenth Amendment compels us to do so, for that is the only basis upon which respondent seeks to sustain her defense. While we are limited to enforcement of the Fourteenth Amendment, the state courts are not; they may decline to recognize the covenants for other reasons. Since we must rest our decision on the Constitution alone, we must set aside predilections on social policy and adhere to the settled rules which restrict the exercise of our power of judicial review—remembering that the only restraint upon this power is our own sense of self-restraint.[3]

Because I cannot see how respondent can avail herself of the Fourteenth Amendment rights of total strangers—the only rights which she has chosen to assert—and since I cannot see how the Court can find that those rights would be impaired in this particular case by requiring respondent to pay petitioners for the injury which she recognizes that she has brought upon them, I am unwilling to join the Court in today's decision.

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[3] See Mr. Justice Stone dissenting in *United States* v. *Butler*, 297 U. S. 1, 78–79 (1936).

SHELTON *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 235, Misc. Decided June 15, 1953.

Claiming illegal search and seizure, a federal prisoner petitioned a Federal District Court under Rule 41 (e) of the Federal Rules of Criminal Procedure for the return of property seized by federal officers and for the suppression of its use in evidence. The District Court denied such relief. The Court of Appeals affirmed. The prisoner petitioned this Court for a writ of certiorari. Confessing that the legality of part of the search and seizure was doubtful, the Government took the position that everything except stolen property should be returned to the prisoner and suggested that the judgments below be vacated and the case be remanded to the District Court for further proceedings. *Held:* Certiorari granted. Upon consideration of the Government's confession of error and after a review of the record in the case, both judgments are vacated and the case is remanded to the District Court for further proceedings.

197 F. 2d 827, judgments vacated and case remanded.

Petitioner *pro se.*

Acting Solicitor General Stern for the United States.

PER CURIAM.

The petition for certiorari is granted. Upon consideration of the Government's confession of error, after reviewing the record in this case, we vacate the judgments of the Court of Appeals and the District Court. The case is remanded to the District Court for further proceedings in light of the confession of error.

CASE ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

JUNE 15 SPECIAL TERM, 1953.

ROSENBERG ET AL. *v.* DENNO, WARDEN.

ON MOTION FOR LEAVE TO FILE PETITION FOR ORIGINAL WRIT OF HABEAS CORPUS AND STAY OF EXECUTION.

No. 1, Misc., June 15 Special Term, 1953. Decided June 15, 1953.

The Rosenbergs had been sentenced to death for conspiracy to violate the Espionage Act of 1917, and the time of execution had been fixed for the week of June 15, 1953. As the Court was about to adjourn the October Term, 1952, on June 15, 1953, their counsel submitted a motion for leave to file a petition for an original writ of habeas corpus and stay of execution. Later that afternoon, the Court met in Special Term pursuant to a call by THE CHIEF JUSTICE having the approval of all the Associate Justices. All Members of the Court were present. *Held:* Leave to file petition for an original writ of habeas corpus denied.

John F. Finerty submitted the motion for petitioners. With him on the motion was *Emanuel H. Bloch.*

PER CURIAM.

The motion for leave to file petition for an original writ of habeas corpus is denied.

MR. JUSTICE BLACK dissents.

MR. JUSTICE FRANKFURTER.

The disposition of an application to this Court for habeas corpus is so rarely to be made by this Court

directly that Congress has given the Court authority to transfer such an application to an appropriate district court. 28 U. S. C. § 2241. I do not favor such a disposition of this application because the substance of the allegations now made has already been considered by the District Court for the Southern District of New York and on review by the Court of Appeals for the Second Circuit. Neither can I join the Court in denying the application without more. I would set the application down for hearing before the full Court tomorrow forenoon. Oral argument frequently has a force beyond what the written word conveys.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

JUNE 18 SPECIAL TERM, 1953.

ROSENBERG ET AL. *v.* UNITED STATES

MOTION TO VACATE A STAY.

No. —, June 18 Special Term, 1953.
Argued June 18, 1953.—Decided June 19, 1953.

The Rosenbergs were convicted and sentenced to death for conspiring to violate the Espionage Act of 1917 by communicating to a foreign government, in wartime, secret atomic and other military information. The overt acts relating to atomic secrets occurred before enactment of the Atomic Energy Act of 1946; but other aspects of the conspiracy continued into 1950. The Court of Appeals affirmed the convictions, and this Court denied certiorari and rehearing. Thereafter, several unsuccessful collateral attacks on the sentences were made in the lower courts, and reviews of the decisions thereon were sought in this Court. After disposing, in effect, of all such collateral attacks then pending in the courts and denying a further stay, this Court adjourned the October Term, 1952. At a Special Term on June 15, 1953, the Court denied a motion for leave to file an original petition for a writ of habeas corpus and for a stay, and again adjourned. Thereafter, counsel for the Rosenbergs applied to MR. JUSTICE DOUGLAS for a stay; but he denied it, since they raised questions already considered by the Court. Counsel who had not been retained by the Rosenbergs but who represented a "next friend" applied to MR. JUSTICE DOUGLAS for a stay and a writ of habeas corpus, contending that the Atomic Energy Act of 1946 rendered the District Court powerless in this case to impose the death penalty under the Espionage Act of 1917. On June 17, 1953, MR. JUSTICE DOUGLAS denied a writ of habeas corpus but granted a stay, effective until the applicability of the Atomic Energy Act could be determined in

the lower courts. The Attorney General petitioned this Court to convene in Special Term and to vacate the stay. *Held*. The stay granted by MR. JUSTICE DOUGLAS is vacated. Pp. 277–296.

1. MR. JUSTICE DOUGLAS had power to issue the stay. Pp. 285, 288, 294.

2. This Court has power to decide, in this proceeding, the question preserved by the stay granted by MR. JUSTICE DOUGLAS, and to vacate that stay. Pp. 286–287.

(a) That the full Court has made no practice of vacating stays issued by single Justices does not prove the nonexistence of the power; it only demonstrates that the circumstances must be unusual before the Court, in its discretion, will exercise its power. P. 286.

(b) The power exercised in this case derives from the Court's role as the final forum to render the ultimate answer to the question which was preserved by the stay. P. 286.

(c) In the unusual circumstances of this case, this Court deemed it proper and necessary to convene in Special Term to consider and act upon the Attorney General's urgent application. Pp. 286–287.

(d) This Court's responsibility to supervise the administration of criminal justice by the federal judiciary includes the duty to see not only that the laws are enforced by fair proceedings but also that the punishments prescribed by the laws are enforced with a reasonable degree of promptness and certainty. P. 287.

3. The stay granted by MR. JUSTICE DOUGLAS is vacated. Pp. 288–289.

(a) A stay should issue only if there is a substantial question to be preserved for further proceedings in the courts. P. 288.

(b) The question whether the Atomic Energy Act of 1946 rendered the District Court powerless in this case to impose the death penalty under the Espionage Act of 1917 is not substantial, and further proceedings to litigate it are unwarranted. Pp. 285–286, 289, 289–290, 294–296.

4. The Atomic Energy Act did not repeal or limit the penalty provisions of the Espionage Act. Pp. 287, 289, 290, 294–296.

(a) At least where different proof is required for each offense, a single act or transaction may violate more than one criminal statute. P. 294.

(b) The partial overlap of two statutes does not work a *pro tanto* repeal of the earlier act, unless the intention of the legislature to repeal the earlier statute is clear and manifest. Pp. 294–295.

(c) Instead of repealing the penalty provisions of the Espionage Act of 1917, the Atomic Energy Act, by § 10 (b) (6), preserves them in undiminished force. P. 295.

(d) Since the crux of the charge alleged overt acts committed before the Atomic Energy Act was enacted, that Act cannot cover the offenses charged, and the alleged inconsistency of its penalty provisions with those of the Espionage Act cannot be sustained. Pp. 295–296.

5. Although the question now urged as being substantial was raised and presented for the first time to MR. JUSTICE DOUGLAS by counsel who have never been employed by the Rosenbergs, and who heretofore have not participated in this case, the full Court has considered it on its merits. The Court does not hold in this case that a waiver of this claim precluded its consideration. Pp. 282–283, 288–289.

6. In the circumstances of this case, in which the Rosenbergs were represented at their trial and in all subsequent proceedings by able and zealous counsel of their own choice, intervention by a stranger as "next friend," without authorization by the Rosenbergs and through counsel who had never been retained by them, is to be discountenanced. Pp. 291–292.

Stay vacated.

For opinion of the Court, delivered by THE CHIEF JUSTICE, see *post*, p. 277.

For *per curiam* opinion, see *post*, p. 288.

For concurring opinion of MR. JUSTICE JACKSON, joined by THE CHIEF JUSTICE, MR. JUSTICE REED, MR. JUSTICE BURTON, MR. JUSTICE CLARK and MR. JUSTICE MINTON, see *post*, p. 289.

For concurring opinion of MR. JUSTICE CLARK, joined by THE CHIEF JUSTICE, MR. JUSTICE REED, MR. JUSTICE JACKSON, MR. JUSTICE BURTON and MR. JUSTICE MINTON, see *post*, p. 293.

For dissenting opinion of MR. JUSTICE BLACK, see *post*, p. 296.

For dissenting opinion of MR. JUSTICE FRANKFURTER, see *post*, p. 301.

For dissenting opinion of MR. JUSTICE DOUGLAS, see *post*, p. 310.

For appendix to opinion of MR. JUSTICE DOUGLAS containing his opinion granting the stay, see *post*, p. 313.

The history of the proceedings in this unusual case is recited in the opinion of the Court, *post*, pp. 277–285.

The Court's Journal for June 18, 1953 (p. 257), contains the following entries:

"The Court met in Special Term pursuant to a call by the Chief Justice.

"Present: Mr. Chief Justice Vinson, Mr. Justice Black, Mr. Justice Reed, Mr. Justice Frankfurter, Mr. Justice Douglas, Mr. Justice Jackson, Mr. Justice Burton, Mr. Justice Clark, and Mr. Justice Minton.

"The Chief Justice said:

" 'The Court is now convened in Special Term to consider an application by the Attorney General (1) to review the stay of execution of Julius Rosenberg and Ethel Rosenberg, granted by Mr. Justice Douglas on June 17, 1953, or (2) for reconsideration and reaffirmance of this Court's order of June 15, 1953, in No. 1, Misc., Julius Rosenberg and Ethel Rosenberg, petitioners, *v.* Wilford L. Denno, Warden of Sing Sing Prison, June 1953 Special Term, denying a stay.

" 'The Special Term convenes with the approval of all the Associate Justices except Mr. Justice Black, who objects.' "

THE CHIEF JUSTICE and all Associate Justices were present when the decision was announced on June 19, 1953.

Acting Solicitor General Stern argued the cause for the United States. With him on the motion and the brief in support thereof was *Attorney General Brownell.*

Arguments in opposition to the Government's motion were made by *Daniel G. Marshall, pro hac vice,* by special leave of the Court, and by *Emanuel H. Bloch, John F. Finerty* and *Fyke Farmer.*

MR. CHIEF JUSTICE VINSON delivered the opinion of the Court.*

A Special Term of the Court was convened upon the Attorney General's application to review a stay of execution in this case, issued by MR. JUSTICE DOUGLAS.

Our action was unusual. So were the circumstances which led to it. The Court's action should be considered in the context of the full history of the proceedings which have marked this case.

On August 17, 1950, the defendants were indicted for conspiring to commit espionage in wartime, in violation of the Espionage Act of 1917, 50 U. S. C. §§ 32 (a), 34. After a lengthy jury trial they were found guilty, and on April 5, 1951, they were sentenced to death. Upon appeal the Court of Appeals affirmed.[1] A petition for rehearing was denied.

A petition for certiorari was filed here. It was denied on October 13, 1952.[2] A petition for rehearing was filed October 28, 1952. It was denied on November 17, 1952.[3]

One week thereafter, a motion was filed in the District Court under § 2255 of the Judicial Code (28 U. S. C.

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*[NOTE: This opinion was filed July 16, 1953.]

[1] 195 F. 2d 583.

[2] 344 U. S. 838. The order noted that MR. JUSTICE BLACK was of the opinion that certiorari should be granted.

[3] 344 U. S. 889–890. The full text of the order reads:

"Motion for leave to file brief of Dr. W. E. B. Dubois and others, as *amici curiae*, denied. Petitions for rehearing denied. Memorandum filed by MR. JUSTICE FRANKFURTER in No. 111. MR. JUSTICE BLACK adheres to his view that the petitions for certiorari should be granted.

"MR. JUSTICE FRANKFURTER.

"Petitioners are under death sentence, and it is not unreasonable to feel that before life is taken review should be open in the highest court of the society which has condemned them. Such right of review was the law of the land for twenty years. By § 6 of the Act of February 6, 1889, 25 Stat. 655, 656, convictions in capital cases arising under federal statutes were appealable here. But in 1911 Congress abolished the appeal as of right, and since then death

§ 2255) to vacate the judgment and sentence. That motion (hereafter called the first § 2255 motion) did not challenge the power of the District Court to impose the death sentence. It was denied.[4] The Court of Appeals

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sentences have come here only under the same conditions that apply to any criminal conviction in a federal court. (§§ 128, 238, 240 and 241 of the Judicial Code, 36 Stat. 1087, 1133, 1157.)

"The Courts of Appeals are charged by Congress with the duty of reviewing all criminal convictions. These are courts of great authority and corresponding responsibility. The Court of Appeals for the Second Circuit was deeply conscious of its responsibility in this case. Speaking through Judge Frank, it said: 'Since two of the defendants must be put to death if the judgments stand, it goes without saying that we have scrutinized the record with extraordinary care to see whether it contains any of the errors asserted on this appeal.' 195 F. 2d 583, 590.

"After further consideration, the Court has adhered to its denial of this petition for certiorari. Misconception regarding the meaning of such a denial persists despite repeated attempts at explanation. It means, and all that it means is, that there were not four members of the Court to whom the grounds on which the decision of the Court of Appeals was challenged seemed sufficiently important when judged by the standards governing the issue of the discretionary writ of certiorari. It also deserves to be repeated that the effective administration of justice precludes this Court from giving reasons, however briefly, for its denial of a petition for certiorari. I have heretofore explained the reasons that for me also militate against noting individual votes when a petition for certiorari is denied. See *Chemical Bank & Trust Co.* v. *Group of Institutional Investors*, 343 U. S. 982.

"Numerous grounds were urged in support of this petition for certiorari; the petition for rehearing raised five additional questions. So far as these questions come within the power of this Court to adjudicate, I do not, of course, imply any opinion upon them. One of the questions, however, first raised in the petition for rehearing, is beyond the scope of the authority of this Court, and I deem it appropriate to say so. A sentence imposed by a United States district court, even though it be a death sentence, is not within the power of this Court to revise."

[4] 108 F. Supp. 798.

affirmed.[5] Certiorari was again sought here, and denied on May 25, 1953. The stay entered by the Court of Appeals was vacated by this Court on the same date.[6] On the next day, a petition for a stay, pending the consideration of a petition for rehearing, to be filed by June 9, 1953, was denied by THE CHIEF JUSTICE. A petition for rehearing was filed and was pending during the last week of the 1952 Term of the Court, the adjournment of the Term having been announced for June 15, 1953.

In the meantime, execution of the sentence was set for the week of June 15th by the District Judge, and two further motions under § 2255 to vacate judgment and sentence were denied in District Court, one on June 1, 1953 and another on June 8, 1953. Those denials were affirmed by the Court of Appeals on June 5 and June 11, 1953, respectively.

In addition to those two motions under § 2255, a petition was also presented to the Court of Appeals asking that a writ of mandamus be issued, directing the sentencing judge to resentence the defendants. On June 2, 1953, the Court of Appeals denied relief by way of mandamus. Thus, as of June 12, 1953, three decisions had been entered by the Court of Appeals in collateral attacks upon the sentence, all three attacks having been instituted

[5] 200 F. 2d 666.

[6] 345 U. S. 965. The full text of the order, Journal, May 25, 1953, p. 225, reads:

"Motions for leave to file briefs of National Lawyers Guild and Joseph Brainin et al., as *amici curiae* denied. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied. The order of the United States Court of Appeals of February 17, 1953, granting a stay of execution is vacated. Mr. Justice Black and Mr. Justice Frankfurter referring to the positions they took when these cases were here last November, adhere to them. 344 U. S. 889. Mr. Justice Douglas is of the opinion the petition for certiorari should be granted."

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by the defendants after our denial of certiorari on May 25, 1953, as to the first motion under § 2255.

On June 12, 1953, an application for a stay of execution was filed with the Clerk of this Court and presented to MR. JUSTICE JACKSON, the appropriate Circuit Justice. This stay was requested to enable the Rosenbergs to seek review of the three most recent decisions of the Court of Appeals "within the time ordered by the applicable statute." MR. JUSTICE JACKSON referred this application to the full Court, with a recommendation that oral argument be heard on it. On June 15, 1953, the last session of the 1952 Term, the Court declined to hear oral argument on this application and denied the stay.[1] The

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[1] 345 U. S. 989. The full text of the order reads:

"An application for stay of execution was filed herein on June 12, 1953. It was referred to MR. JUSTICE JACKSON, the appropriate Circuit Justice. MR. JUSTICE JACKSON referred it to the Court for consideration and action, with the recommendation 'that it be set for oral hearing on Monday, June 15, 1953, at which time the parties have agreed to be ready for argument.'

"Upon consideration of the recommendation, the Court declined to hear oral argument on the application.

"MR. JUSTICE FRANKFURTER and MR. JUSTICE BURTON, agreeing with MR. JUSTICE JACKSON'S recommendation, believe that the application should be set for hearing on Monday, June 15, 1953.

"Thereupon, the Court gave consideration to the application for the stay, and denies it, MR. JUSTICE BURTON joining in such denial.

"MR. JUSTICE FRANKFURTER and MR. JUSTICE JACKSON, believing that the application for a stay should not be acted upon without a hearing before the full Court, do not agree that the stay should be denied.

"MR. JUSTICE BLACK is of the opinion that the Court should grant a rehearing and a stay pending final disposition of the case. But since a sufficient number do not vote for a rehearing, he is willing to join those who wish to hear argument on the question of a stay.

"MR. JUSTICE DOUGLAS would grant a stay and hear the case on the merits, as he thinks the petition for certiorari and the petition for rehearing present substantial questions. But since the Court has

pending petition for rehearing as to the May 25, 1953, denial of certiorari, was also denied.[8] Thus the Court had in effect, disposed of all collateral attacks upon the sentence then pending in the courts—as to the first § 2255 motion by adhering to its original denial of certiorari and as to the three subsequent decisions of the Court of Appeals in the further collateral proceedings by denying a stay, a decision which showed that the Court saw no substantial question in those proceedings to be preserved for its further consideration.

Just a moment before adjournment of the 1952 Term, on June 15, 1953, a petition for an original writ of habeas corpus, including a request for a stay, was presented to the Court. On account of the imminence of the execution, counsel urged immediate action. They were advised that prompt consideration would be given to the application. The Court met in Special Term on the afternoon

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decided not to take the case, there would be no end served by hearing oral argument on the motion for a stay. For the motion presents no new substantial question not presented by the petition for certiorari and by the petition for rehearing."

[8] 345 U. S. 1003. The full text of the order, Journal, June 15, 1953, p. 250, reads:

"Petition for rehearing denied. Mr. Justice Frankfurter deems it appropriate to state once more that the reasons that preclude publication by the Court, as a general practice, of votes on petition for certiorari guide him in all cases, so that it has been his 'unbroken practice not to note dissent from the Court's disposition of petitions for certiorari.' *Chemical Bank Co.* v. *Investors*, 343 U. S. 982; *Maryland* v. *Baltimore Radio Show*, 338 U. S. 912; *Darr* v. *Burford*, 339 U. S. 200, 227; *Agoston* v. *Pennsylvania*, 340 U. S. 844; *Bondholders, Inc.* v. *Powell*, 342 U. S. 921; *Rosenberg* v. *United States*, 344 U. S. 889, 345 U. S. 965. Partial disclosure of votes on successive stages of a certiorari proceeding does not present an accurate picture of what took place.

"Mr. Justice Black is of the opinion the petition for rehearing should be granted."

of that day and denied the application.[9] The Special Term was then adjourned.

Late on June 15, 1953, counsel for the defendants applied to MR. JUSTICE DOUGLAS for a stay. On June 16, 1953, counsel representing one Edelman, who described himself as "next friend" to the Rosenbergs, presented to MR. JUSTICE DOUGLAS a petition for habeas corpus. That petition included a prayer for a stay. More than two months before their appearance before MR. JUSTICE DOUGLAS, Edelman's attorneys had asked counsel for the Rosenbergs to raise the very question which they urged upon MR. JUSTICE DOUGLAS. The argument was not adopted at that time by counsel for the defendants.[10] In

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[9] 346 U. S. 271. The full text of the order, Journal, June 15, 1953, p. 256, reads:

"The motion for leave to file petition for an original writ of habeas corpus is denied. Mr. Justice Black dissents.

"Mr. Justice Frankfurter:

" 'The disposition of an application to this Court for habeas corpus is so rarely to be made by this Court directly that Congress has given the Court authority to transfer such an application to an appropriate district court. 28 U. S. C., § 2241. I do not favor such a disposition of this application because the substance of the allegations now made has already been considered by the District Court for the Southern District of New York and on review by the Court of Appeals for the Second Circuit. Neither can I join the Court in denying the application without more. I would set the application down for hearing before the full Court tomorrow forenoon. Oral argument frequently has a force beyond what the written word conveys.' "

[10] Counsel for the Rosenbergs was aware of the existence of the Atomic Energy Act long before receiving the suggestion from counsel for Edelman. One argument, *inter alia*, advanced in the original certiorari petition, which was filed June 7, 1952, was that the sentence of death constituted cruel and unusual punishment in violation of the Eighth Amendment of the Constitution. The requirement of the Atomic Energy Act of an intent to injure the United States as a prerequisite to the death penalty (42 U. S. C. § 1810 (b)(2) and (3) and § 1816) was cited in the petition in support of the cruel and unusual punishment argument. In the petition for certiorari,

this recitation of facts, we do not hold in this case that a waiver of this claim precluded its consideration.

On the morning of June 17, 1953, MR. JUSTICE DOUGLAS denied the stay requested by counsel for the defendants, since it raised questions already passed upon by the Court.

Edelman's counsel raised the claim that the Atomic Energy Act of 1946, 42 U. S. C. § 1810 (b)(2) and (3), superseded the Espionage Act and rendered the District Court without power to impose the death sentence. MR. JUSTICE DOUGLAS was of the opinion that this contention posed a substantial question; he denied the application for habeas corpus, but granted a stay, effective until the applicability of the Atomic Energy Act could be determined in the District Court and the Court of Appeals.

The Attorney General then applied to the Court, asking that we convene a Special Term of Court and vacate the stay. The Court was convened in Special Term on June 18, 1953, MR. JUSTICE BLACK objecting.

Thus we were brought to this particular proceeding. The case was argued for several hours on June 18. The Court then recessed and deliberated in conference for several hours. During the next morning the Court held another conference, and then met at noon and announced its decision in a per curiam opinion. We vacated the stay.

Immediately following the announcement of this decision, counsel for the Rosenbergs moved for a further stay asking that the Court grant them an additional period in which they might seek executive clemency. Counsel for Edelman moved that the Court reconsider the question of its power to vacate the stay. After a recess and

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as well as in the petition for rehearing, filed October 28, 1952, in regard to other contentions, counsel for the defendants cited Newman, Control of Information Relating to Atomic Energy, 56 Yale L. J. 769. That article deals extensively with the relationship of sentences under the Atomic Energy Act to those under the Espionage Act.

deliberation, the Court denied both motions, with MR. JUSTICE BLACK noting dissents, and MR. JUSTICE FRANKFURTER appending a separate memorandum to each order.[11]

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[11] The order denying a further stay, 346 U. S. 322, reads:

"Motion of the petitioners for a further stay of the execution, as set forth in the written motion, is denied.

"MR. JUSTICE BLACK dissents.

"MR. JUSTICE FRANKFURTER.

"On the assumption that the sentences against the Rosenbergs are to be carried out at 11 o'clock tonight, their counsel ask this Court to stay their execution until opportunity has been afforded to them to invoke the constitutional prerogative of clemency. The action of this Court, and the division of opinion in vacating the stay granted by MR. JUSTICE DOUGLAS, are, of course, a factor in the situation, which arose within the last hour. It is not for this Court even remotely to enter into the domain of clemency reserved by the Constitution exclusively to the President. But the Court must properly take into account the possible consequences of a stay or of a denial of a stay of execution of death sentences upon making an appeal for executive clemency. Were it established that counsel are correct in their assumption that the sentences of death are to be carried out at 11 p. m. tonight, I believe that it would be right and proper for this Court formally to grant a stay with a proper time-limit to give appropriate opportunity for the process of executive clemency to operate. I justifiably assume, however, that the time for the execution has not been fixed as of 11 o'clock tonight. Of course I respectfully assume that appropriate consideration will be given to a clemency application by the authority constitutionally charged with the clemency function."

The order, 346 U. S. 324, denying a rehearing on the question of our power to vacate the stay reads:

"The motion for reconsideration of the question of the Court's power to vacate MR. JUSTICE DOUGLAS' stay order and hear oral argument is denied.

"MR. JUSTICE BLACK dissents.

"MR. JUSTICE FRANKFURTER desires that it be noted that he too would deny the motion to reconsider the power of this Court to review MR. JUSTICE DOUGLAS' order to stay the execution, but not because he thinks the matter is free from doubt. See his dissenting

The Special Term was adjourned. Thereafter executive clemency was denied. The sentence of death was carried out.

We have recited the history of this unusual case at length because we think a full recitation is necessary to a proper understanding of the decision rendered. We proceed to discuss two questions of power: the power of MR. JUSTICE DOUGLAS to issue the stay; and the power of this Court to decide, in this proceeding, the question preserved by the stay and the vacation of the stay.

MR. JUSTICE DOUGLAS had power to issue the stay. No one has disputed this, and we think the proposition is indisputable.

Stays are part of the "traditional equipment for the administration of justice." *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U. S. 4, 9–10 (1942). The individual Justices of this Court have regularly issued them, and the exercise of that power is vital to the proper functioning of our jurisdiction.

Confronted with the question of the applicability of the Atomic Energy Act, MR. JUSTICE DOUGLAS wrote:

> "I have serious doubts whether this death sentence may be imposed for this offense except and unless a jury recommends it. The Rosenbergs should have an opportunity to litigate that issue.
>
> "I will not issue the writ of *habeas corpus*. But I will grant a stay effective until the question of the applicability of the penal provisions of § 10 of the Atomic Energy Act to this case can be determined by the District Court and the Court of Appeals, after which the question of a further stay will be open to the Court of Appeals or to a member of this Court in the usual order." (See *post*, p. 321.)

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opinion in *Ex parte Peru*, 318 U. S. 578, 590, in connection with *Lambert* v. *Barrett*, 157 U. S. 697, and *Carper* v. *Fitzgerald*, 121 U. S. 87."

After hearing argument on this question, we did not entertain the serious doubts which MR. JUSTICE DOUGLAS had.

We turn next to a consideration of our power to decide, in this proceeding, the question preserved by the stay. It is true that the full Court has made no practice of vacating stays issued by single Justices, although it has entertained motions for such relief.[12] But reference to this practice does not prove the nonexistence of the power; it only demonstrates that the circumstances must be unusual before the Court, in its discretion, will exercise its power.

The power which we exercised in this case derives from this Court's role as the final forum to render the ultimate answer to the question which was preserved by the stay.

Thus MR. JUSTICE DOUGLAS, in issuing the stay, did not act to grant some form of amnesty or last-minute reprieve to the defendants; he simply acted to protect jurisdiction over the case, to maintain the status quo until a conclusive answer could be given to the question which had been urged in the defendants' behalf. In the exercise of our jurisdiction to decide the question which was preserved for decision, it lay within our power to bring the new claim before us and examine its merits without further delay. In considering this question, the Court carried out the limited purpose for which MR. JUSTICE DOUGLAS issued the stay.

The existence of our power was clear, and so also, we think, was the necessity for its exercise. Yet it was urged at argument that the Court, as a matter of discretion if not of power, should refrain from immediately deciding the merits of the issue which had been preserved by the stay. Indeed, the reasons for refusing, as a matter of practice, to vacate stays issued by single Justices are

[12] See, *e. g.*, *Land* v. *Dollar*, 341 U. S. 737 (1951); *Johnson* v. *Stevenson*, 335 U. S. 801 (1948).

obvious enough. Ordinarily the stays of individual Justices should stand until the grounds upon which they have issued can be reviewed through regular appellate processes.

In this case, however, we deemed it proper and necessary to convene the Court to consider the Attorney General's urgent application. MR. JUSTICE DOUGLAS denied the petition for habeas corpus. His grant of a stay called for initiation of a new proceeding in the District Court. It followed hard on the heels of our orders denying a rehearing, denying a further stay and denying a motion for leave to file a petition for habeas corpus in which a stay was requested. The stay issued by MR. JUSTICE DOUGLAS was based, of course, on a new claim—a question which had not been considered in any prior proceeding.

This Court has the responsibility to supervise the administration of criminal justice by the federal judiciary. This includes the duty to see that the laws are not only enforced by fair proceedings, but also that the punishments prescribed by the laws are enforced with a reasonable degree of promptness and certainty. The stay which had been issued promised many more months of litigation in a case which had otherwise run its full course.

The question preserved for adjudication by the stay was entirely legal; there was no need to resort to the fact-finding processes of the District Court; it was a question of statutory construction which this Court was equipped to answer. We decided that a proper administration of the laws required the Court to consider that question forthwith.

This brought us to the merits. Our decision was summarized in our per curiam opinion.[13] We held that the Atomic Energy Act of 1946 did not displace the Espionage Act. We held that this issue raised no doubts of such magnitude as to require further proceedings before

[13] *Post*, p. 288.

execution of the District Court's original mandate—a mandate which had been affirmed on appeal and sustained thereafter despite continuous collateral attack.

More complete statements of the reasons for our decision are set forth in the opinions of MR. JUSTICE JACKSON [14] and MR. JUSTICE CLARK.[15] We need not reiterate here what has been said in those opinions. It is enough to add that, in our view, the ultimate decision was clear. Accordingly, we vacated the stay.

PER CURIAM.*

We convened a Special Term of the Court to consider an application by the Attorney General (1) to review the stay of execution of Julius Rosenberg and Ethel Rosenberg, granted by MR. JUSTICE DOUGLAS on June 17, 1953, or (2) for reconsideration and reaffirmance of this Court's order in No. 1, Misc., June 15 Special Term, 1953, *Julius Rosenberg and Ethel Rosenberg, petitioners,* v. *Wilford L. Denno, Warden of Sing Sing Prison,* denying a stay, *ante,* p. 271.

The Acting Solicitor General agrees and we do not doubt that MR. JUSTICE DOUGLAS had power to issue the stay in these proceedings. There is no dispute that a stay should issue only if there is a substantial question to be preserved for further proceedings in the courts.

The question which has been and now is urged as being substantial is whether the provisions of the Atomic Energy Act of 1946, 42 U. S. C. § 1810 (b)(2), (3), rendered the District Court powerless to impose the death sentence under the Espionage Act of 1917, 50 U. S. C. §§ 32 (a), 34, under which statute the indictment was laid.

Although this question was raised and presented for the first time to MR. JUSTICE DOUGLAS by counsel who

[14] *Post,* p. 289.

[15] *Post,* p. 293.

*[NOTE: This opinion was delivered June 19, 1953.]

have never been employed by the Rosenbergs, and who heretofore have not participated in this case, the full Court has considered it on its merits.

We think the question is not substantial. We think further proceedings to litigate it are unwarranted. A conspiracy was charged and proved to violate the Espionage Act in wartime. The Atomic Energy Act did not repeal or limit the provisions of the Espionage Act. Accordingly, we vacate the stay entered by MR. JUSTICE DOUGLAS on June 17, 1953.

We are entering this order in advance of the preparation of full opinions which will be filed with the Clerk.

Stay granted by Mr. Justice Douglas vacated.

MR. JUSTICE FRANKFURTER is of opinion that the questions raised for the first time yesterday before the full Court by the application of the Attorney General are complicated and novel. He believes that, in order to enable the Court to adjudicate these issues upon adequate deliberation, this application should be disposed of only after opportunity has been afforded to counsel for both sides to make an adequate study and presentation. In due course, MR. JUSTICE FRANKFURTER will set forth more specifically the grounds for this position.*

By MR. JUSTICE JACKSON, whom THE CHIEF JUSTICE, MR. JUSTICE REED, MR. JUSTICE BURTON, MR. JUSTICE CLARK, and MR. JUSTICE MINTON join.†

This stay was granted upon such legal grounds that this Court cannot allow it to stand as the basis upon which lower courts must conduct further long-drawn proceedings.

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*[See *post*, p. 301.]

†[NOTE: This opinion was delivered June 19, 1953.]

The sole ground stated was that the sentence may be governed by the Atomic Energy Act of August 1, 1946, instead of by the earlier Espionage Act. The crime here involved was commenced June 6, 1944. This was more than two years before the Atomic Energy Act was passed. All overt acts relating to atomic energy on which the Government relies took place as early as January 1945.

The Constitution, Art. I, § 9, prohibits passage of any *ex post facto* Act. If Congress had tried in 1946 to make transactions of 1944 and 1945 offenses, we would have been obliged to set such an Act aside. To open the door to retroactive criminal statutes would rightly be regarded as a most serious blow to one of the civil liberties protected by our Constitution. Yet the sole ground of this stay is that the Atomic Energy Act may have retrospective application to conspiracies in which the only overt acts were committed before that statute was enacted.

We join in the opinion by MR. JUSTICE CLARK and agree that the Atomic Energy Act does not, by text or intention, supersede the earlier Espionage Act. It does not purport to repeal the earlier Act, nor afford any grounds for spelling out a repeal by implication. Each Act is complete in itself and each has its own reason for existence and field of operation. Certainly prosecution, conviction and sentence under the law in existence at the time of the overt acts are not improper. It is obvious that an attempt to prosecute under the later Act would in all probability fail.

This stay is not and could not be based upon any doubt that a legal conviction was had under the Espionage Act. Application here for review of the Court of Appeals decision affirming the conviction was refused, 344 U. S. 838, and rehearing later denied, 344 U. S. 889.

Later, responsible and authorized counsel raised, among other issues, questions as to the sentence, and an applica-

tion was made for stay until they could be heard. The application was referred to the full Court, with the recommendation that the full Court hold immediate hearing and as an institution make a prompt and final disposition of all questions. This was supported by four Justices and failed for want of one more, MR. JUSTICE DOUGLAS recording his view that "there would be no end served by hearing oral argument on the motion for a stay." 345 U. S. 989.

Thus, after being in some form before this Court over nine months, the merits of all questions raised by the Rosenbergs' counsel had been passed upon, or foreclosed by denials. However, on this application we have heard and decided (since it had been the ground for granting the stay) a new contention, despite the irregular manner in which it was originally presented.

This is an important procedural matter of which we disapprove. The stay was granted solely on the petition of one Edelman, who sought to appear as "next friend" of the Rosenbergs. Of course, there is power to allow such an appearance, under circumstances such as incapacity of the prisoner or isolation from counsel, which make it appropriate to enable the Court to hear a prisoner's case. But in these circumstances the order which grants Edelman standing further to litigate this case in the lower courts cannot be justified.

Edelman is a stranger to the Rosenbergs and to their case. His intervention was unauthorized by them and originally opposed by their counsel. What may be Edelman's purpose in getting himself into this litigation is not explained, although inquiry was made at the bar. It does not appear that his own record is entirely clear or that he would be a helpful or chosen champion. See *Edelman* v. *California*, 344 U. S. 357.

The attorneys who appear for Edelman tell us that for two months they tried to get the authorized counsel for

the Rosenbergs to raise this issue but were refused. They also inform us that they have eleven more points to present hereafter, although the authorized counsel do not appear to have approved such issues.

The Rosenbergs throughout have had able and zealous counsel of their own choice. These attorneys originally thought this point had no merit and perhaps also that it would obscure the better points on which they were endeavoring to procure a hearing here. Of course, after a Justice of this Court had granted Edelman standing to raise the question and indicated that he is impressed by its substantiality, counsel adopted the argument and it became necessary for us to review it. They also shared their time and the counsel table with the Edelman lawyers thus admitted as attorneys-at-large to their case. The lawyers who have ably and courageously fought the Rosenbergs' battle throughout then listened at this bar to the newly imported counsel make an argument which plainly implied lack of understanding or zeal on the part of the retained counsel. They simply had been elbowed out of the control of their case.

Every lawyer familiar with the workings of our criminal courts and the habits of our bar will agree that this precedent presents a threat to orderly and responsible representation of accused persons and the right of themselves and their counsel to control their own cases. The lower court refused to accept Edelman's intrusion but by the order in question must accept him as having standing to take part in, or to take over, the Rosenbergs' case. That such disorderly intervention is more likely to prejudice than to help the representation of accused persons in highly publicized cases is self-evident. We discountenance this practice.

Vacating this stay is not to be construed as indorsing the wisdom or appropriateness to this case of a death sen-

tence. That sentence, however, is permitted by law and, as was previously pointed out, is therefore not within this Court's power of revision. 344 U. S. 889, 890.

MR. JUSTICE CLARK, with whom THE CHIEF JUSTICE, MR. JUSTICE REED, MR. JUSTICE JACKSON, MR. JUSTICE BURTON, and MR. JUSTICE MINTON join.*

Seven times now have the defendants been before this Court. In addition, THE CHIEF JUSTICE, as well as individual Justices, has considered applications by the defendants. The Court of Appeals and the District Court have likewise given careful consideration to even more numerous applications than has this Court.

The defendants were sentenced to death on April 5, 1951. Beginning with our refusal to review the conviction and sentence in October 1952, each of the Justices has given the most painstaking consideration to the case. In fact, all during the past Term of this Court one or another facet of this litigation occupied the attention of the Court. At a Special Term on June 15, 1953, we denied for the sixth time the defendants' plea. The next day an application was presented to MR. JUSTICE DOUGLAS, contending that the penalty provisions of the Atomic Energy Act governed this prosecution; and that, since the jury did not find that the defendants committed the charged acts with intent to injure the United States nor recommend the imposition of the death penalty, the court had no power to impose the sentence of death. After a hearing MR. JUSTICE DOUGLAS, finding that the contention had merit, granted a stay of execution. The Court convened in Special Term to review that determination. Cf. *Ex parte Quirin*, 317 U. S. 1 (1942).

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*[NOTE: This opinion was delivered June 19, 1953.]

Human lives are at stake; we need not turn this decision on fine points of procedure or a party's technical standing to claim relief. Nor did MR. JUSTICE DOUGLAS lack the power and, in view of his firm belief that the legal issues tendered him were substantial, he even had the duty to grant a temporary stay. But for me the short answer to the contention that the Atomic Energy Act of 1946 may invalidate defendants' death sentence is that the Atomic Energy Act cannot here apply. It is true that § 10 (b)(2) and (3) of that Act authorizes capital punishment only upon recommendation of a jury and a finding that the offense was committed with intent to injure the United States. 60 Stat. 755, 766, 42 U. S. C. § 1810 (b)(2), (3). (Notably, by that statute the death penalty may be imposed for *peacetime* offenses as well, thus exceeding in harshness the penalties provided by the Espionage Act.) This prosecution, however, charged a wartime violation of the Espionage Act of 1917 under which these elements are not prerequisite to a sentence of death. Where Congress by more than one statute proscribes a private course of conduct, the Government may choose to invoke either applicable law: "At least where different proof is required for each offense, a single act or transaction may violate more than one criminal statute." *United States* v. *Beacon Brass Co.*, 344 U. S. 43, 45 (1952); see also *United States* v. *Noveck*, 273 U. S. 202, 206 (1927); *Gavieres* v. *United States*, 220 U. S. 338 (1911). Nor does the partial overlap of two statutes necessarily work a *pro tanto* repealer of the earlier Act. *Ibid.* "It is a cardinal principle of construction that repeals by implication are not favored. When there are two acts upon the same subject, the rule is to give effect to both if possible . . . . The intention of the legislature to repeal 'must be clear and manifest.' . . . It is not sufficient . . . 'to establish that subsequent laws cover some or even all of the cases provided for by [the prior

act]; for they may be merely affirmative, or cumulative, or auxiliary.' There must be 'a positive repugnancy between the provisions of the new law, and those of the old.'" *United States* v. *Borden Co.*, 308 U. S. 188, 198 (1939). Otherwise the Government when charging a conspiracy to transmit both atomic and non-atomic secrets would have to split its prosecution into two alleged crimes. Section 10 (b)(6) of the Atomic Energy Act itself, moreover, expressly provides that § 10 "shall not exclude the applicable provisions of any other laws . . . ," an unmistakable reference to the 1917 Espionage Act.* Therefore this section of the Atomic Energy Act, instead of repealing the penalty provisions of the Espionage Act, in fact preserves them in undiminished force. Thus there is no warrant for superimposing the penalty provisions of the later Act upon the earlier law.

In any event, the Government could not have invoked the Atomic Energy Act against these defendants. The crux of the charge alleged overt acts committed in 1944 and 1945, years before that Act went into effect. While some overt acts did in fact take place as late as 1950, they related principally to defendants' efforts to avoid detec-

*See Newman and Miller, The Control of Atomic Energy, p. 235 (1948); Newman, Control of Information Relating to Atomic Energy, 56 Yale L. J. 769, 790 (1947).

While § 10 (b)(6) additionally contains an exception, providing that "no Government agency shall take any action under such other laws inconsistent with the provisions of this section," that exception is not applicable here. As disclosed by the legislative history of the Act (which must be read to refer to § 10 (b)(6)), it "prohibits any agency from placing information in a restricted category under the authority of this or any other law once such information has been released from the category by official action of the Atomic Energy Commission." S. Rep. No. 1211, 79th Cong., 2d Sess., p. 24. And see 92 Cong. Rec. 6096 (1946): "Section 10 also establishes the Commission as the top authority in the Government with reference to what will or will not remain as restricted data . . . ."

tion and prosecution of earlier deeds. Grave doubts of unconstitutional *ex post facto* criminality would have attended any prosecution under that statute for transmitting atomic secrets before 1946. Since the Atomic Energy Act thus cannot cover the offenses charged, the alleged inconsistency of its penalty provisions with those of the Espionage Act cannot be sustained.

Our liberty is maintained only so long as justice is secure. To permit our judicial processes to be used to obstruct the course of justice destroys our freedom. Over two years ago the Rosenbergs were found guilty by a jury of a grave offense in time of war. Unlike other litigants they have had the attention of this Court seven times; each time their pleas have been denied. Though the penalty is great and our responsibility heavy, our duty is clear.

MR. JUSTICE BLACK, dissenting.*

It is argued that the Court is not asked to "act with unseemly haste to avoid postponement of a scheduled execution." I do not agree. I do not believe that Government counsel or this Court has had time or an adequate opportunity to investigate and decide the very serious question raised in asking this Court to vacate the stay granted by MR. JUSTICE DOUGLAS. The oral arguments have been wholly unsatisfactory due entirely to the lack of time for preparation by counsel for the Government and counsel for the defendants. Certainly the time has been too short for me to give this question the study it deserves. The following are some of the reasons why I think the Court should not at this time upset the considered rulings of MR. JUSTICE DOUGLAS. I add my regret that the rush of this case has deprived me of any oppor-

*[NOTE: This opinion was delivered June 19, 1953.]

tunity to do more at this time than hastily sketch my view on the important questions raised.

First. The Government argues that this Court has power to set aside the stay granted by MR. JUSTICE DOUGLAS. I think this is doubtful. I have found no statute or rule of court which permits the full Court to set aside a mere temporary stay entered by a Justice in obedience to his statutory obligations.* Moreover, it is a commonplace for judges to grant stays in vacation. This is a healthy and necessary Court custom. There may have been prior instances where vacation stays of individual Justices have been set aside by the full Court before the next regular term, but no such cases have been pointed out in the Solicitor General's argument and I have found none. So far as I can tell, the Court's action here is unprecedented.

But if the Court could find statutory or constitutional power to vacate this stay, there are many reasons why I believe that power should not be exercised. Concededly,

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*The Government cites 28 U. S. C. § 2106 and 28 U. S. C. § 1651 as statutory authority for the Court's action in dissolving the stay granted by MR. JUSTICE DOUGLAS. Neither statute authorizes the Court's action. Section 2106 provides:

"The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

But the plain words of this section exclude the case here. Those words say this Court may affirm, etc., any "judgment, decree, or order *of a court* . . . ." But no *court* order is before us. Nor can the Government take comfort in § 1651. It says only that "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." The statute says nothing about dissolution of a stay order.

an individual Justice has power to grant stays where substantial questions are raised. He not merely has power to do so; there is a serious obligation upon him to grant a stay where new substantial questions are presented. Where the life or death of citizens is involved, that obligation is all the heavier. Surely the Court is not here establishing a precedent which will require it to call extra sessions during vacation every time a federal or state official asks it to hasten the electrocution of defendants without affording this Court adequate time or opportunity for exploration and study of serious legal questions. It is not inappropriate to point out that in *Lambert* v. *Barrett*, 157 U. S. 697, decided in 1895 and never overruled, this Court held that it had no jurisdiction over an appeal from a habeas corpus order of a circuit judge entered in chambers. The stay order in this case derives from petitions for habeas corpus and was entered by MR. JUSTICE DOUGLAS in chambers.

Second. The stay of MR. JUSTICE DOUGLAS in this case was based on his studied conclusion that there were substantial grounds to believe the death sentences of these two people were imposed by the District Judge in violation of law. I agree with MR. JUSTICE DOUGLAS. The Government contends, however, that the death sentences were properly imposed under the Espionage Act of 1917, 50 U. S. C. § 32, which gives a district judge unconditional power to impose the death penalty for violation of that Act. But the Atomic Energy Act, 42 U. S. C. § 1810, passed in 1946, appears to have taken the death sentencing power from district judges, in cases of atomic energy espionage, except where juries recommend a death sentence and where there are allegations and proof that atomic energy information has been unlawfully transmitted with intent to injure the United States. The indictment here charged a conspiracy alleged to have continued from June 6, 1944, to June 16, 1950. Thus the

alleged conspiracy covered one period of conduct where the 1917 Act plainly governed and another period of conduct after the Atomic Energy Act went into effect. The Rosenbergs were charged with conspiracy to disclose atomic secrets as well as other kinds of secrets. Under these circumstances it would more nearly fit into the general canons of construction to hold that a District Court could impose sentence only under the less harsh statute.

I am not unaware of the Government's argument that this Court can and should give full effect to both these statutes, one which deprives the District Court of unconditional power to impose the death sentence and one which grants such unconditional power. This would be a strange argument in any case but it seems still stranger to me in a case which involves matters of life and death. The stay of MR. JUSTICE DOUGLAS is based entirely on his desire to have this matter passed upon in due course and after proper deliberation in a habeas corpus proceeding brought in district court and followed through to this Court. That is as it should be. Judicial haste is peculiarly out of place where the death penalty has been imposed for conduct part of which took place at a time when the Congress appears to have barred the imposition of the death penalty by district judges acting without a jury's recommendation. And it seems to me that this Court has not had time or opportunity for sufficient study to give the kind of informed decision on this important question it would if the case should take its regular course.

Third. I am aware also of the argument that MR. JUSTICE DOUGLAS should not have considered and that we should not now consider the point here involved because the Rosenbergs' lawyers had not originally raised it on appeal. I cannot believe, however, that if the sentence of a citizen to death is plainly illegal, this Court would allow that citizen to be executed on the grounds that his

lawyers had "waived" plain error. An illegal execution is no less illegal because a technical ground of "waiver" is assigned to justify it. Compare *Bowen* v. *Johnston*, 306 U. S. 19, 26. After having seen the Court's order I find that it appears to agree with this view.

Fourth. The inadequate oral arguments before this Court have left me with the firm conviction that the applicability of the penal provisions of the Atomic Energy Act of 1946 to this case presents a substantial and serious question. This I think is fully demonstrated by the opinion written by MR. JUSTICE DOUGLAS when he granted the stay order, a copy of which is attached by him as an appendix to his opinion with which opinion I agree. It is my view based on the limited arguments we have heard that after passage of the Atomic Energy Act of 1946 it was unlawful for a judge to impose the death penalty for unlawful transmittal of atomic secrets unless such a penalty was recommended by the jury trying the case. I think this question should be decided only after time has been afforded counsel for the Government and for the defendants to make more informed arguments than we have yet heard and after this Court has had an opportunity to give more deliberation than it has given up to this date. This I think would be more nearly in harmony with the best judicial traditions.

I may add that I voted to grant certiorari originally in this case. That petition for certiorari challenged the fairness of the trial. It also challenged the right of the Government to try these defendants except under the limited rules prescribed by the Constitution defining the offense of treason. These I then believed to be important questions. In motions for rehearing the arguments as to the unfairness of the trial were expanded and I again voted for review. I have long thought that the practice of some of the states to require an automatic review by the

highest court of the state in cases which involve the death penalty was a good practice.

It is not amiss to point out that this Court has never reviewed this record and has never affirmed the fairness of the trial below. Without an affirmance of the fairness of the trial by the highest court of the land there may always be questions as to whether these executions were legally and rightfully carried out. I would still grant certiorari and let this Court approve or disapprove the fairness of the trials.

MR. JUSTICE FRANKFURTER, dissenting.*

On an application made after adjournment of the Court, MR. JUSTICE DOUGLAS granted a stay of execution of the death sentences of Julius and Ethel Rosenberg. On the afternoon of the same day, the Attorney General of the United States filed an application to convene the Court in Special Term with a view to vacating the stay. It was not until late that afternoon that arrangements for convening the Court the following day could be completed. Less than three hours before the Court convened at about noon on Thursday, June 18, and in the case of some members of the Court only a few minutes before noon, did the individual members of the Court receive the Government's application and brief bearing on the propriety and reviewability of MR. JUSTICE DOUGLAS' order.

There followed three hours of argument on jurisdictional and procedural issues as well as on the issue of the substantiality of the question of law raised by the application for a stay which led to MR. JUSTICE DOUGLAS' order. In vacating that order the Court found no infirmity in it on any jurisdictional or procedural ground. The Court recognized MR. JUSTICE DOUGLAS' power to

*[NOTE: This opinion was filed June 22, 1953.]

entertain the application for a stay;[1] his power to consider a question though raised by counsel not of record; his power to consider a question not heretofore urged, when it concerned the legality of a sentence. See *Ex parte Lange*, 18 Wall. 163.

Thus the only issue in the case was whether the question on the basis of which MR. JUSTICE DOUGLAS acted was patently frivolous or was sufficiently serious to require the judicial process to run its course with the deliberation necessary for confident judgment. That is the sole issue to which this opinion is addressed. All else is irrelevant. Once the Court conceded, as it did, that the substantiality of the question raised before MR. JUSTICE DOUGLAS was the sole issue, it became wholly immaterial how many other questions were raised and considered on their merits in the District Court and in the Court of Appeals, or how many times review was sought on these questions and refused by this Court. It was equally immaterial how long a time intervened between the original trial of this case and the present proceeding, and immaterial that this was a last-minute effort almost on the eve of the executions. To allow such irrelevancies to enter the mind not unnaturally tends to bend the judicial judgment in a false direction.

And so I turn to what is for me controlling in this case. I summarized my position in the following notation on the Court's order:

> "MR. JUSTICE FRANKFURTER is of opinion that the questions raised for the first time yesterday before the full Court by the application of the Attorney General are complicated and novel. He believes

[1] Naturally enough the Government and the Court "do not doubt that MR. JUSTICE DOUGLAS had power to issue the stay in these proceedings." How could there be doubt about a power that has existed uninterruptedly ever since Congress gave it by the Act of September 24, 1789? Section 14 of the First Judiciary Act, 1 Stat. 73, 81–82.

that, in order to enable the Court to adjudicate these issues upon adequate deliberation, this application should be disposed of only after opportunity has been afforded to counsel for both sides to make an adequate study and presentation. In due course, MR. JUSTICE FRANKFURTER will set forth more specifically the grounds for this position."

Painful as it is, I am bound to say that circumstances precluded what to me are indispensable conditions for solid judicial judgment. They precluded me, and now preclude me, from saying that the legal issue that was raised before MR. JUSTICE DOUGLAS was without substance. Let me set forth some of the difficulties that immediately arise upon consideration of that issue.

The basis on which a jury convicts is authoritatively to be taken from what the judge tells the jury. In this case, the jury's attention was especially directed to the fact that the charge was a conspiracy to obtain and transmit classified materials pertaining in part to the atomic bomb:

"Bear in mind—please listen to this, ladies and gentlemen—that the Government contends that the conspiracy was one to obtain not only atomic bomb information, but other secret and classified information; that the information including the report regarding fire-control equipment requested of Elitcher by Sobell or Rosenberg was classified; that the atomic bomb information transmitted by the Rosenbergs was classified as top secret; that based on Rosenberg's alleged statements to Greenglass, other secret information such as mathematical data on atomic energy for airplanes, information relating to a 'sky platform' project and other information was obtained by Julius Rosenberg from scientist contacts in the country." R. 1557.

And the indictment charged that the conspiracy continued from 1944 to 1950. Such "averments of time in the indictment are expected and intended to be proved as laid." *United States* v. *Kissel*, 218 U. S. 601, 609. Indeed, the judge told the jury: "You must first determine from all the evidence in the case, relating to the period of time defined in the indictment, whether or not a conspiracy existed." R. 1552. Only one conspiracy could have been found by the jury to have existed, and that was the conspiracy averred in the indictment, a conspiracy continuous from a date certain in 1944 to a date certain in 1950. The Government could of course have charged a conspiracy beginning in 1944 and ending on July 31, 1946, the day before the Atomic Energy Act came into effect. It did not do so. That fact is of decisive importance. The consequences of a conspiracy that was afoot for six years might have been vastly different from those of a conspiracy that terminated within two years, that is, by the time Congress devised legislation to protect atomic energy secrets.

It is suggested that the overt acts laid in the indictment all occurred before the effective date of the Atomic Energy Act and that hence the indictment did not charge any offense committed after that effective date. But, again, the offense charged in the indictment was a conspiracy, not one or more overt acts.[2] As the judge told the jury, they had to find a conspiracy in order to convict,

[2] It is worth noting that under the Atomic Energy Act it is very probably not necessary, since the Act, unlike the Espionage Act, does not make it a requirement, to prove overt acts in furtherance of a conspiracy. Cf. *Singer* v. *United States*, 323 U. S. 338. If so, under the Atomic Energy Act it would not have been necessary to allege or prove an overt act involving atomic espionage subsequent to 1946 in order to obtain a conviction on a conspiracy indictment such as the one here. It is not without significance that the relevance of this point was not considered by the Government in its argument or sub-

a conspiracy aimed principally at obtaining atomic secrets and characterized as such by the overt acts alleged, but a conspiracy, I cannot too often repeat, alleged to have been continuous to a date certain in 1950. The Government having tried the Rosenbergs for a conspiracy, continuing from 1944 to 1950, to reveal atomic secrets among other things, it flies in the face of the charge made, the evidence adduced and the basis on which the conviction was secured now to contend that the terminal date of the Rosenberg conspiracy preceded the effective date of the Atomic Energy Act.

It thus appears—although, of course, I would feel more secure in my conviction had I had the opportunity to make a thorough study of the lengthy record in this case—that the conspiracy with which the Rosenbergs were charged is one falling in part within the terms of the Atomic Energy Act, passed by Congress in 1946 and specifically dealing with classified information pertaining to the recent developments in atomic energy. There remains the question whether the sentence for such a conspiracy could be imposed under the Espionage Act.

Congress was not content with the penal provisions of the Espionage Act of 1917 to prevent disclosure of atomic energy information. The relevant provisions of the Atomic Energy Act of 1946 differ in several respects from those of the Espionage Act. For one thing the 1946 Act makes possible the death penalty for disclosures in time of peace as well as in war. Some disclosures which fell generally within the Espionage Act now specifically fall under § 10 of the Atomic Energy Act. The decisive thing in this case is that under the Espionage Act the power

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mission. This is significant not because it discloses a failure of counsel, but because to require consideration of this and other points within twenty-four hours after a complex of problems was first put forward is to presuppose omniscient lawyers.

to impose a sentence of death was left exclusively to the discretion of the court, while under the Atomic Energy Act a sentence of death can be imposed only upon recommendation of the jury.

Surely it needs only statement that with such a drastic difference in the authority to take life between the Espionage Act and the Atomic Energy Act, it cannot be left within the discretion of a prosecutor whether the judge may impose the death sentence wholly on his own authority or whether he may do so only upon recommendation of the jury. Nothing can rest on the prosecutor's caprice in placing on the indictment the label of the 1917 Act or of the 1946 Act. To seek demonstration of such an absurdity, in defiance of our whole conception of impersonality in the criminal law, would be an exercise in self-stultification. The indorsement of an indictment, the theory under which the prosecutor is operating, his belief or error as to the statute which supports an indictment or under which sentences may be imposed, are all wholly immaterial.[3] See *Williams* v. *United States*, 168 U. S. 382, 389.

These considerations—the fact that Congress and not the whim of the prosecutor fixes sentences, that the allegations of an indictment are to be judged by the relevant statute under which punishment may be meted out and not by the design of the prosecutor or the assumption of the trial court—cut across all the talk about repeal

[3] "In order to determine whether an indictment charges an offense against the United States, designation by the pleader of the statute under which he purported to lay the charge is immaterial. He may have conceived the charge under one statute which would not sustain the indictment but it may nevertheless come within the terms of another statute. See *Williams* v. *United States*, 168 U. S. 382. On the other hand, an indictment may validly satisfy the statute under which the pleader proceeded, but other statutes not referred to by him may draw the sting of criminality from the allegations." *United States* v. *Hutcheson*, 312 U. S. 219, 229.

by implication and other empty generalities on statutory construction. Congress does not have to say in so many words that hereafter a judge cannot without jury recommendation impose a sentence of death on a charge of conspiracy that falls within the Atomic Energy Act. It is enough if in fact Congress has provided that hereafter such a death sentence is to depend on the will of the jury.

This much, at least, lies on the surface of an analysis of the two statutes. The Reports of this Court are replete with instances of marked division of opinion in construing criminal statutes; doubtful and ambiguous statutory language and like ambiguities in the interpretative materials that led to many of those divisions are certainly not more impressive, to say the least, than the ambiguities and difficulties here. See, *e. g.*, *United States* v. *Dotterweich*, 320 U. S. 277; *United States* v. *Singer*, 323 U. S. 338; *United States* v. *Petrillo*, 332 U. S. 1; *United States* v. *C. I. O.*, 335 U. S. 106; *United States* v. *Williams*, 341 U. S. 70; *United States* v. *Hood*, 343 U. S. 148.

In all matters of statutory construction one goes, especially these days, to the history of the legislation and other illuminating materials. It is almost mathematically demonstrable that there just was not time within twelve waking hours to dig out, to assess, to assemble, and to formulate the meaning of legislative materials. Suffice it to say that such materials bearing on legislative purpose as a necessarily very limited inquiry has revealed do not justify certitude. See S. Rep. No. 1211, 79th Cong., 2d Sess. 23–24; 92 Cong. Rec. 6082, 6096, 9257, 10194; cf. *id.*, at 9481–9482. And an authoritative commentary on the Atomic Energy Act, written by counsel for the Senate Special Committee on Atomic Energy which drafted the statute, not only recognizes a compelling need for judicial decision in order to reconcile the conflicting penalty provisions of that Act and of the

Espionage Act but seems, as I read it, to point to the view that on facts like those of this case the Atomic Energy Act may well be found to apply to the exclusion of the Espionage Act.[4] Newman, Control of Information Relating to Atomic Energy, 56 Yale L. J. 769.

Neither counsel nor the Court, in the time available, were able to go below the surface of the question raised

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[4] That the Atomic Energy Act is not a pellucid piece of draftsmanship so that he who runs may read is indicated by this general observation of Mr. Newman: "Skillful administration and careful judicial consideration will be needed to reconcile the apparent inconsistencies and to effect the evident intent of Congress—regardless of the labyrinth of confusion that inadequate drafting has created." 56 Yale L. J., at 791.

Some of the specific difficulties laid bare by Mr. Newman are of immediate relevance to the problem before the Court:

"It is reasonable to suppose that Congress did not intend to give the prosecuting attorney the option of moving under the Espionage Act instead of the Atomic Energy Act where an offense involving information relating to atomic energy is specifically described in the latter and only broadly and generically encompassed by the former. On the other hand this judgment creates an intellectual predicament. Its acceptance might mean that while the disclosure of information relating to the construction of a machine gun, may, under given circumstances, be punishable by death, the disclosure of information relating to the exact construction of an atomic bomb, would not, under the same circumstances, be punishable by more than 10 years' imprisonment. But in spite of its anomalous consequences the conclusion seems inescapable. When Congress adopted Section 10 of the Atomic Energy Act it intended to prescribe the exact punishment to be applied for all violations involving the unlawful dissemination of restricted atomic energy data. And, in stating in Section 10 (b) (6) that the applicable provisions of other laws were not to be excluded, it meant to guard against possible omissions, rather than to give a prosecutor the option of proceeding under other laws against offenses fully covered by the Atomic Energy Act for the sole reason that under such other laws these offenses bore heavier penalties." 56 Yale L. J., at 797–798.

Finally, this specially qualified student of the Act concludes that the conflicts and inconsistencies which he laid bare regarding the

by the application for a stay which MR. JUSTICE DOUGLAS granted. More time was needed than was had for adequate consideration. Arguments by counsel are an indispensable adjunct of the judicial process, and responsible arguments require adequate opportunity for preparation. They must be pressed with the force of partisanship. And, because arguments are partisan, judgment further presupposes ample time and an unhurried mind for independent study and reflection by judges as a basis for discussion in conference. Without adequate study there cannot be adequate reflection; without adequate reflection there cannot be adequate discussion; without adequate discussion there cannot be the searching and fruitful interchange of informed minds which is indispensable to wise decision and which alone can produce compelling opinions. We have not had in this case carefully prepared argument. We have not had what cannot exist without that essential preliminary. We have not had the basis for reaching conclusions and for supporting them in opinions. Can it be said that there was time to go through the process by which cases are customarily decided here?

The crux of all I am suggesting is that none of the obvious considerations for bringing the all too leaden-footed proceedings in this case to an end should have barred the full employment of the deliberative process necessary for reaching a firm conclusion on the issue on which the Court has now spoken, however unfortunate it may be that that issue did not emerge earlier than it did. Since I find myself under the disability of having had

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penalty provisions can only be resolved, as such conflicts and inconsistencies inevitably are resolved, by adjudication:

"*Differing penalty provisions:* The difference can only be resolved by judicial decision. Fortunately, this raises problems within judicial proceedings as such and does not pose any difficulties or dilemmas for the Commission in administering the Act." 56 Yale L. J., at 709.

insufficient time to explore the issue as I believe it should have been explored, nothing I am saying may be taken to intimate that I would now sustain the last claim made in behalf of the Rosenbergs. But I am clear that the claim had substance and that the opportunity for adequate exercise of the judicial judgment was wanting.

To be writing an opinion in a case affecting two lives after the curtain has been rung down upon them has the appearance of pathetic futility. But history also has its claims. This case is an incident in the long and unending effort to develop and enforce justice according to law. The progress in that struggle surely depends on searching analysis of the past, though the past cannot be recalled, as illumination for the future. Only by sturdy self-examination and self-criticism can the necessary habits for detached and wise judgment be established and fortified so as to become effective when the judicial process is again subjected to stress and strain.

American criminal procedure has its defects, though its essentials have behind them the vindication of long history. But all systems of law, however wise, are administered through men and therefore may occasionally disclose the frailties of men. Perfection may not be demanded of law, but the capacity to counteract inevitable, though rare, frailties is the mark of a civilized legal mechanism.

MR. JUSTICE DOUGLAS, dissenting.†

When the motion for a stay was before me, I was deeply troubled by the legal question tendered. After twelve hours of research and study I concluded, as my opinion* indicated, that the question was a substantial one, never

†[NOTE: This opinion was delivered June 19, 1953.]

*Attached hereto as an Appendix, *post*, p. 313.

presented to this Court and never decided by any court. So I issued the stay order.

Now I have had the benefit of an additional argument and additional study and reflection. Now I know that I am right on the law.

The Solicitor General says in oral argument that the Government would have been laughed out of court if the indictment in this case had been laid under the Atomic Energy Act of 1946. I agree. For a part of the crime alleged and proved antedated that Act. And obviously no criminal statute can have retroactive application. But the Solicitor General misses the legal point on which my stay order was based. It is this—whether or not the death penalty can be imposed *without the recommendation of the jury* for a crime involving the disclosure of atomic secrets where a part of that crime takes place after the effective date of the Atomic Energy Act.

The crime of the Rosenbergs was a conspiracy that started prior to the Atomic Energy Act and continued almost four years after the effective date of that Act. The overt acts *alleged* were acts which took place prior to the effective date of the new Act. But that is irrelevant for two reasons. *First*, acts in pursuance of the conspiracy were proved which took place *after* the new Act became the law. *Second*, under *Singer* v. *United States*, 323 U. S. 338, no overt acts were necessary; the crime was complete when the conspiracy was proved. And that conspiracy, as defined in the indictment itself, endured almost four years after the Atomic Energy Act became effective.

The crime therefore took place in substantial part *after* the new Act became effective, *after* Congress had written new penalties for conspiracies to disclose atomic secrets. One of the new requirements is that the death penalty for that kind of espionage can be imposed *only* if the jury recommends it. And here there was no such recommen-

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dation. To be sure, this espionage included more than atomic secrets. But there can be no doubt that the death penalty was imposed because of the Rosenbergs' disclosure of atomic secrets. The trial judge, in sentencing the Rosenbergs to death, emphasized that the heinous character of their crime was trafficking in atomic secrets. He said:

> "I believe your conduct in putting into the hands of the Russians the A-bomb years before our best scientists predicted Russia would perfect the bomb has already caused, in my opinion, the Communist aggression in Korea, with the resultant casualties exceeding 50,000 and who knows but that millions more of innocent people may pay the price of your treason. Indeed, by your betrayal you undoubtedly have altered the course of history to the disadvantage of our country."

But the Congress in 1946 adopted new criminal sanctions for such crimes. Whether Congress was wise or unwise in doing so is no question for us. The cold truth is that the death sentence may not be imposed for what the Rosenbergs did unless the jury so recommends.

Some say, however, that since *a part* of the Rosenbergs' crime was committed under the old law, the penalties of the old law apply. But it is law too elemental for citation of authority that where two penal statutes may apply—one carrying death, the other imprisonment—the court has no choice but to impose the less harsh sentence.

A suggestion is made that the question comes too late, that since the Rosenbergs did not raise this question on appeal, they are barred from raising it now. But the question of an unlawful sentence is never barred. No man or woman should go to death under an unlawful sentence merely because his lawyer failed to raise the point. It is that function among others that the Great Writ

serves. I adhere to the views stated by Mr. Chief Justice Hughes for a unanimous Court in *Bowen* v. *Johnston*, 306 U. S. 19, 26–27:

> "It must never be forgotten that the writ of *habeas corpus* is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired. *Ex parte Lange* [18 Wall. 163]. The rule requiring resort to appellate procedure when the trial court has determined its own jurisdiction of an offense is not a rule denying the power to issue a writ of *habeas corpus* when it appears that nevertheless the trial court was without jurisdiction. The rule is not one defining power but one which relates to the appropriate exercise of power."

Here the trial court was without jurisdiction to impose the death penalty, since the jury had not recommended it.

Before the present argument I knew only that the question was serious and substantial. Now I am sure of the answer. I know deep in my heart that I am right on the law. Knowing that, my duty is clear.

APPENDIX TO OPINION OF MR. JUSTICE DOUGLAS.

Julius Rosenberg and Ethel Rosenberg, Petitioners, v. The United States of America. } Application for a Stay.

June 17, 1953.

Mr. Justice Douglas.

These are two applications for a stay of execution made to me after adjournment of the Court on June 15, 1953. The first raises questions concerning the fairness of the trial of the Rosenbergs. I have heard oral argument

on that motion and considered the papers that have been filed. This application does not present points substantially different from those which the Court has already considered in its several decisions to deny review of the case, to deny a stay of execution, and to deny a petition for a writ of *habeas corpus*. While I differed with the Court and thought the case should have been reviewed, the Court has spoken and I bow to its decision. Although I have the power to grant a stay, I could not do so responsibly on grounds the Court has already rejected.

Another motion for stay, together with a petition for writ of *habeas corpus*, challenges the power of the District Court to impose the death sentence on the Rosenbergs. The Espionage Act, § 2 (a), 40 Stat. 217, 218 (50 U. S. C. § 32 (a)) provides:

> "Whoever, with intent or reason to believe that it is to be used to the injury of the United States or *to the advantage of a foreign nation*, communicates, delivers, or transmits, or attempts to, or aids or induces another to, communicate, deliver, or transmit, to any foreign government, or to any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States, or to any representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, map, model, note, instrument, appliance, or information relating to the national defense, shall be punished by imprisonment for not more than twenty years: *Provided, That whoever shall violate the provisions of subsection (a) of this section in time of war shall be punished by death* or by imprisonment for not more than thirty years . . . ." (Italics added.)

Section 4 provides:

> "If two or more persons conspire to violate the provisions of sections two or three of this title, and one or more of such persons does any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished as in said sections provided in the case of the doing of the act the accomplishment of which is the object of such conspiracy. Except as above provided conspiracies to commit offenses under this title shall be punished as provided by section thirty-seven of the Act to codify, revise, and amend the penal laws of the United States approved March fourth, nineteen hundred and nine." 40 Stat. 219, 50 U. S. C. § 34.

The indictment, which was returned in 1951, charged a conspiracy to violate § 32 (a) with an intent to communicate information that would be used to the advantage of a foreign nation, *viz.*, Soviet Russia. The conspiracy was alleged to have continued from June 6, 1944 to and including June 16, 1950. The overt acts of the Rosenbergs which were *alleged* took place in 1944 and 1945.

On August 1, 1946, the Atomic Energy Act became effective. Sections 10 (b)(2) and (3) provide:

> "(2) Whoever, lawfully or unlawfully, having possession of, access to, control over, or being entrusted with, any document, writing, sketch, photograph, plan, model, instrument, appliance, note or information involving or incorporating restricted data—[1]

[1] It would seem that the secrets involved in this case were "restricted data" within the meaning of the Act. Section 10 (b)(1) defines that term as meaning "all data concerning the manufacture or utilization of atomic weapons, the production of fissionable material, or the use of fissionable material in the production of power, but shall not

"(A) communicates, transmits, or discloses the same to any individual or person, or attempts or conspires to do any of the foregoing, with intent to injure the United States or with intent to secure an advantage to any foreign nation, upon conviction thereof, shall be punished by death or imprisonment for life (*but the penalty of death or imprisonment for life may be imposed only upon recommendation of the jury and only in cases where the offense was committed with intent to injure the United States*); or by a fine of not more than $20,000 or imprisonment for not more than twenty years, or both;" (italics added).

"(B) communicates, transmits, or discloses the same to any individual or person, or attempts or conspires to do any of the foregoing, with reason to believe such data will be utilized to injure the United States or to secure an advantage to any foreign nation, shall, upon conviction, be punished by a fine of not more than $10,000 or imprisonment for not more than ten years, or both.

"(3) Whoever, with intent to injure the United States or with intent to secure an advantage to any foreign nation, acquires or attempts or conspires to acquire any document, writing, sketch, photograph, plan, model, instrument, appliance, note or information involving or incorporating restricted data shall, upon conviction thereof, be punished by death or imprisonment for life (*but the penalty of death or imprisonment for life may be imposed only upon recommendation of the jury and only in cases where the offense was committed with intent to injure the*

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include any data which the Commission from time to time determines may be published without adversely affecting the common defense and security."

United States); or by a fine of not more than $20,000 or imprisonment for not more than twenty years, or both." (Italics added.) 60 Stat. 755, 766, 42 U. S. C. § 1810 (b)(2), (3).

It is apparent from the face of this new law that the District Court is without power to impose the death penalty except

—upon recommendation of the jury
and
—where the offense was committed with an intent to injure the United States.

Neither of those conditions is satisfied in this case, as the jury did not recommend the death penalty nor did the indictment charge that the offense was committed with an intent to injure the United States. If the Atomic Energy Act of 1946 is applicable to the prosecution of the Rosenbergs, the District Court unlawfully imposed the death sentence.

The Department of Justice maintains that the Espionage Act is applicable to the indictment because all of the overt acts *alleged* took place before the passage of the Atomic Energy Act of 1946. Petitioners maintain that since the indictment was returned subsequent to the Atomic Energy Act and since the conspiracy alleged, though starting prior to that time, continued thereafter, the lighter penalties of the new Act apply.

Curiously, this point has never been raised or presented to this Court in any of the earlier petitions or applications. The first reaction is that if it was not raised previously, it must have no substance to it. But on reflection I think it presents a considerable question. One purpose of the Atomic Energy Act was to ameliorate the penalties imposed for disclosing atomic secrets. As S. Rep. No. 1211, 79th Cong., 2d Sess., p. 23, stated, the problem in drafting § 10 was to protect the "common

defense and security" and yet assure "sufficient freedom of interchange between scientists to assure the Nation of continued scientific progress."

The Rosenbergs obviously were not engaged in an exchange of scientific information in the interests of science. But Congress lowered the level of penalties to protect all those who might be charged with the unlawful disclosure of atomic data. And if the Rosenbergs are the beneficiaries, it is merely the result of the application of the new law with an even hand. In any event, Congress prescribed the precise conditions under which the death penalty could be imposed. And all violators—Communists as well as non-Communists—are entitled to that protection.

This question is presented to me for the first time on the eve of the execution of the Rosenbergs without the benefit of briefs or any extended research. I cannot agree that it is a frivolous point or without substance. It may be that not every death penalty imposed for divulging atomic secrets need follow the procedure prescribed in § 10 of the Atomic Energy Act. If the crime was complete prior to the passage of that Act, possibly the old Espionage Act would apply. But this case is different in three respects: *First*, the offense charged was a conspiracy commencing before but continuing after the date of the new Act. *Second*, although the overt acts *alleged* were committed in 1944 and in 1945, the Government's case showed acts of the Rosenbergs in pursuance of the conspiracy long after the new Act became effective.[2]

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[2] Thus the Government's brief filed July 25, 1952, in opposition to the petitions of the Rosenbergs and of Sobell for certiorari stated:

"In February 1950, when the arrest of Klaus Fuchs was publicized, Julius [Rosenberg] went to David [Greenglass] and told him that Fuchs' contact was the man who had got data from Ruth and David in June 1945; that Fuchs' arrest meant that the Greenglasses' activities would be discovered; and that therefore they would have to leave

Third, the overt acts of the co-conspirator, Sobell, were *alleged* to have taken place between January, 1946, and May, 1948. But the proof against Sobell, as against the Rosenbergs, extended well beyond the effective date of the new Act.[5] In short, a substantial portion of the case

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the country (R. 523). These warnings were renewed at the time of the arrest of Harry Gold (R. 525–526, 709) in May 1950. During that month, Julius gave David $1,000, and promised him more, in order that David and Ruth might discharge their obligations and leave the country (R. 526, 710). In addition, he gave them specific and detailed instructions as to how to get to Mexico and ultimately to the Soviet Union (R. 526–530, 710).

"Julius informed the Greenglasses that he and his wife also were going to flee and that they would meet the Greenglasses in Mexico (R. 529, 713). Rosenberg did, in fact, ascertain from his physician what inoculations were needed for a trip to Mexico (R. 851), and he had passport pictures taken of himself and his family (R. 1427–1429).

"On May 30, 1950, in accordance with Julius' request, the Greenglasses had six sets of passport pictures taken, five of which they gave to Julius (R. 530–531, 712). The sixth set was retained by Greenglass and introduced in evidence at the trial (R. 531, 712; Ex. 9A, 9B). A week later, Julius visited the Greenglasses' apartment and gave David $4,000 wrapped in brown paper (R. 532, 713; Ex. 10). He asked David to repeat the flight instructions, which David did (R. 532–533). David gave the $4,000 to his brother-in-law, Louis Abel, who, after David's arrest, turned it over to the latter's lawyer (R. 536, 713, 794–795)."

[5] The Government's brief dated July 25, 1952, in opposition to the petitions for certiorari filed by the Rosenbergs and by Sobell summarized some of Sobell's activities as follows:

"In June 1948, [Max] Elitcher decided to leave the Bureau of Ordnance to take a job in New York (R. 256). When he informed Sobell of his plans, the latter urged him not to do anything until he discussed the matter with Rosenberg (R. 256).* Pursuant to arrangements made by Sobell, Elitcher met Rosenberg and Sobell in

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"*Elitcher testified that Sobell said, 'Don't do anything before you see me. I want to talk to you about it, and Rosenberg also wants to speak to you about it' (R. 256)."

against the Rosenbergs related to acts in pursuance of the conspiracy which occurred after August 1, 1946.

I do not decide that the death penalty could have been imposed on the Rosenbergs only if the provisions of § 10

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midtown New York (R. 256–257). When Rosenberg was told about Elitcher's plans, he tried to persuade Elitcher to remain in Washington, stating that he needed a source of information in the Navy Department (R. 257). Rosenberg further stated that he had already made plans for Elitcher to meet a contact in Washington (R. 257). During this conversation, Sobell also attempted to persuade Elitcher to stay at the Bureau of Ordnance; he told Elitcher, 'Well, Rosenberg is right, Julie is right; you should do that' (R. 257).†

"Sobell then left and Elitcher had dinner with Rosenberg (R. 257). During the course of dinner, Rosenberg said that money could be made available for the purpose of sending Elitcher to school to improve his technical status (R. 258). Elitcher asked Rosenberg how he had got 'started in this venture' (R. 258). Rosenberg replied that a long time ago he had decided that this was what he wanted to do; that he made it a point to get close to people in the Communist Party and kept getting from one person to another until he finally succeeded in approaching a Russian 'who would listen to his proposition concerning this matter of getting information to Russia' (R. 258).

"A month later, in July 1948, Elitcher drove with his family from Washington, D. C., to New York City, preparatory to changing his job (R. 259). On the way, he noticed that he was being followed (R. 259–260). Upon his arrival in New York, he proceeded to Sobell's home, where he planned to stay overnight (R. 259). When Elitcher told Sobell of his fear that he had been followed, Sobell became angry and said that Elitcher should not have come to his house; that he had some valuable information in the house that he should have given Rosenberg some time ago, information that was 'too valuable to be destroyed and yet too dangerous to keep around' (R. 260–261). Over Elitcher's protests, Sobell insisted the information be delivered to Rosenberg that night. Sobell then took a 35 millimeter film can from his house, and, accompanied by Elitcher, drove to Manhattan. While Elitcher waited in the car, Sobell left to deliver the can to Rosenberg. When Sobell returned, Elitcher

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"†Elitcher, nonetheless, did not change his mind, and shortly afterwards changed his employment (R. 257, 255)."

of the Atomic Energy Act of 1946 were satisfied. I merely decide that the question is a substantial one which should be decided after full argument and deliberation.

It is important that the country be protected against the nefarious plans of spies who would destroy us.

It is also important that before we allow human lives to be snuffed out we be sure—emphatically sure—that we act within the law. If we are not sure, there will be lingering doubts to plague the conscience after the event.

I have serious doubts whether this death sentence may be imposed for this offense except and unless a jury recommends it. The Rosenbergs should have an opportunity to litigate that issue.

I will not issue the writ of *habeas corpus*. But I will grant a stay effective until the question of the applicability of the penal provisions of § 10 of the Atomic Energy Act to this case can be determined by the District Court and the Court of Appeals, after which the question of a further stay will be open to the Court of Appeals or to a member of this Court in the usual order.

So ordered.

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asked him what Rosenberg thought about his being followed (R. 261). Sobell replied that Rosenberg said that he had 'once talked to Elizabeth Bentley on the phone but he was pretty sure she didn't know who he was and therefore everything was all right' (R. 261). The two then returned to Sobell's house (R. 261)."

ROSENBERG ET AL. *v.* UNITED STATES.

MOTION TO VACATE A STAY.

No. —, June 18 Special Term, 1953. Decided June 19, 1953.

After the stay granted by MR. JUSTICE DOUGLAS had been vacated by the Court, *ante*, p. 273, counsel for the Rosenbergs moved for a further stay pending action by the President on a petition for executive clemency. *Held:* Further stay denied.

Emanuel H. Bloch submitted the motion for a further stay.

PER CURIAM.

Motion of the petitioners for a further stay of the execution, as set forth in the written motion, is denied.

MR. JUSTICE BLACK dissents.

MR. JUSTICE FRANKFURTER.

On the assumption that the sentences against the Rosenbergs are to be carried out at 11 o'clock tonight, their counsel ask this Court to stay their execution until opportunity has been afforded to them to invoke the constitutional prerogative of clemency. The action of this Court, and the division of opinion in vacating the stay granted by MR. JUSTICE DOUGLAS, are, of course, a factor in the situation, which arose within the last hour. It is not for this Court even remotely to enter into the domain of clemency reserved by the Constitution exclusively to the President. But the Court must properly take into account the possible consequences of a stay or of a denial of a stay of execution of death sentences upon making an appeal for executive clemency. Were it established that counsel are correct in their assumption that the sentences of death are to be carried out at 11 p. m.

tonight, I believe that it would be right and proper for this Court formally to grant a stay with a proper time-limit to give appropriate opportunity for the process of executive clemency to operate. I justifiably assume, however, that the time for the execution has not been fixed as of 11 o'clock tonight. Of course I respectfully assume that appropriate consideration will be given to a clemency application by the authority constitutionally charged with the clemency function.

ROSENBERG ET AL. *v.* UNITED STATES.

MOTION TO VACATE A STAY.

No. —, June 18 Special Term, 1953. Decided June 19, 1953.

After the stay granted by MR. JUSTICE DOUGLAS had been vacated by the Court, *ante*, p. 273, a motion was made for reconsideration of the question of the Court's power to vacate that stay and that the Court hear oral argument. *Held:* Motion denied.

Fyke Farmer submitted the motion.

PER CURIAM.

The motion for reconsideration of the question of the Court's power to vacate MR. JUSTICE DOUGLAS' stay order and hear oral argument is denied.

MR. JUSTICE BLACK dissents.

MR. JUSTICE FRANKFURTER desires that it be noted that he too would deny the motion to reconsider the power of this Court to review MR. JUSTICE DOUGLAS' order to stay the execution, but not because he thinks the matter is free from doubt. See his dissenting opinion in *Ex parte Peru*, 318 U. S. 578, 590, in connection with *Lambert* v. *Barrett*, 157 U. S. 697, and *Carper* v. *Fitzgerald*, 121 U. S. 87.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1953.

LEMKE *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 109. Decided October 12, 1953.

Petitioner was convicted of a crime and sentenced to imprisonment. He filed his notice of appeal the next day; but judgment was not entered until several days later. *Held:* Though Rule 37 (a)(2) of the Federal Rules of Criminal Procedure provides that such appeals may be taken "within 10 days after entry of the judgment," the irregularity in noting the appeal prematurely should have been disregarded under Rule 52 (a), as it did not "affect substantial rights," and the appeal should not have been dismissed. Pp. 325–326.

203 F. 2d 406, reversed.

Bailey E. Bell for petitioner.

Acting Solicitor General Davis, Assistant Attorney General Olney, Beatrice Rosenberg and *Robert G. Maysack* for the United States.

PER CURIAM.

This case is here on a petition for certiorari to the Court of Appeals for the Ninth Circuit, which dismissed an appeal as premature. Rule 37 (a)(2) of the Federal Rules of Criminal Procedure provides that "An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from . . . ."

On March 10, 1952, petitioner was sentenced to six months in jail after a jury verdict finding him guilty of violating § 65–5–81 of the Alaska Compiled Laws Ann., 1949. On March 11, 1952, petitioner filed his notice of appeal. The judgment, however, was not entered until March 14, 1952. Since no notice of appeal was filed after that time, the appeal was dismissed as premature, Judge Pope dissenting.

The notice of appeal filed on March 11 was, however, still on file on March 14 and gave full notice after that date, as well as before, of the sentence and judgment which petitioner challenged. We think the irregularity is governed by Rule 52 (a) which reads "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

Accordingly we grant the petition for certiorari, reverse the judgment below, and remand the case for further proceedings consistent with this opinion.

THE CHIEF JUSTICE took no part in the consideration or decision of this case.

FEDERAL TRADE COMMISSION v. CARTER PRODUCTS, INC.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 114. Decided October 12, 1953.

The judgment of the Court of Appeals setting aside a cease and desist order of the Federal Trade Commission is vacated, and the cause is remanded to the Court of Appeals with directions to reinstate its prior judgment after amending it so as specifically to authorize the Commission to open this proceeding for further evidence and a new order consistent with the opinion of the Court of Appeals.

201 F. 2d 446, judgment vacated and cause remanded.

Acting Solicitor General Stern and *William T. Kelley* for petitioner.

William L. Hanaway for respondent.

PER CURIAM.

Certiorari is granted and the judgment of the Court of Appeals is vacated. The cause is remanded to the Court of Appeals with directions to reinstate its prior judgment and order after amending it so that it specifically authorizes the Federal Trade Commission to open this proceeding for further evidence and a new order consistent with the Court of Appeals opinion herein. Cf. *Reilly* v. *Pinkus*, 338 U. S. 269, 277; *Labor Board* v. *Donnelly Garment Co.*, 330 U. S. 219, 224–228.

MR. JUSTICE DOUGLAS dissents.

THE CHIEF JUSTICE took no part in the consideration or decision of this case.

275520 O—54——26

VORIS, DEPUTY COMMISSIONER, *v.* EIKEL ET AL., DOING BUSINESS AS SOUTHERN STEVEDORING & CONTRACTING CO., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 20. Argued October 14, 1953.—Decided November 9, 1953.

Petitioner, a stevedore subject to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, suffered an injury in the course of his employment that necessitated removing him from his job to his home. Written notice of the injury was not given to the employer until six months later; but the foreman of the gang in which petitioner worked and the walking foreman who had employed petitioner and who supervised his work had actual notice on the day of the accident, and the latter reported it to the timekeeper. It was customary for an injured employee to report to his immediate supervisor, who would send or take him to the timekeeper. Both the supervisor and the timekeeper were instructed to report injuries to the employer or agent in charge; but it was not shown that they did so in this case. *Held:* On the record in this case, the Deputy Commissioner was justified in finding that the employer had notice of the injury within the meaning of § 12 (d) of the Act. Pp. 329–334.

(a) It would be indefensible to hold that the requirements of § 12 (d) are not satisfied unless the claimant can demonstrate that the employer or the person he selects to be in charge had actual personal knowledge of the injury—especially in this case in which the employer claimed that a gearman was temporarily in charge and it was not shown that the foremen or workmen had notice of his designation. P. 332.

(b) Where the employee follows the practice prescribed by the employer in reporting injuries, the burden of any failure of the agents of the employer designated to receive such information to report it to him must fall on the employer, and not on the employee. Pp. 332–333.

200 F. 2d 724, reversed.

Murray L. Schwartz argued the cause for petitioner. With him on the brief were *Acting Solicitor General Stern, Assistant Attorney General Burger* and *Samuel D. Slade.*

John R. Brown argued the cause for respondents. With him on the brief was *E. D. Vickery.*

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

This case involves the proper application of the notice provisions of the Longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1424, as amended, 33 U. S. C. § 901 *et seq.*) by a Deputy Commissioner to the claim of an employee admittedly subject to the provisions of the Act. Section 12 of the Act provides:

> "(a) Notice of an injury or death in respect of which compensation is payable under this chapter shall be given within thirty days after the date of such injury or death (1) to the deputy commissioner in the compensation district in which such injury occurred and (2) to the employer.
>
> "(b) Such notice shall be in writing, shall contain the name and address of the employee and a statement of the time, place, nature, and cause of the injury or death, and shall be signed by the employee or by some person on his behalf, or in case of death, by any person claiming to be entitled to compensation for such death or by a person on his behalf.
>
> . . . . .
>
> "(d) Failure to give such notice shall not bar any claim under this chapter (1) if the employer (or his agent in charge of the business in the place where the injury occurred) or the carrier had knowledge of the injury or death and the deputy commissioner determines that the employer or carrier has not been prej-

udiced by failure to give such notice, or (2) if the deputy commissioner excuses such failure on the ground that for some satisfactory reason such notice could not be given . . . ." 44 Stat. 1431, 33 U. S. C. § 912.

The Deputy Commissioner found in favor of the claimant, and awarded compensation. The United States District Court for the Southern District of Texas reversed his decision and enjoined further payments, 101 F. Supp. 963. The Court of Appeals for the Fifth Circuit affirmed by a divided court, 200 F. 2d 724. This Court granted certiorari to review the interpretation of the statute. 345 U. S. 955.

The facts as disclosed by the record and found by the Deputy Commissioner are as follows:

The claimant, Earl Porter, was a stevedore employed by the Southern Stevedoring and Contracting Company. On December 19, 1949, while he was working in the hold of the S. S. *Southern States,* the loading equipment struck an electric fixture which, in breaking, ignited some sulphur and created a flash fire. The men fled in terror from the hold, and, while claimant was on the ladder, he was struck by a beam and knocked to the floor, with resulting injuries to his back and shoulder. The Deputy Commissioner found that the injuries were permanent. No written notice was given to the employer until six months after the accident.

Several workmen in the stevedoring gang saw the claimant injured. Others, including Leslie Lovely, foreman of the gang in which claimant worked, saw him on the deck immediately after the injury, unable to walk. Some of claimant's fellow workers carried him to a nearby automobile. The walking foreman, Ernest Wisby, who supervised the work of both stevedoring gangs on the

vessel, was immediately notified by the claimant of his injury, and it was Wisby who drove the claimant to his home.

The claimant testified that he asked Wisby to take him to a doctor, but that the latter told him he could not reach one until 7:00 a. m. This was at 4:15 a. m. Claimant testified that he crawled into the house instead of walking because of the pain he was suffering. Wisby did not return to take him to the doctor. Claimant further testified that later on the morning of the accident he sent his wife to the home of Wisby in order to have the latter arrange for a doctor but was told he was asleep, and that two or three days later he went to Wisby's house and demanded that he be taken to a doctor. Wisby admitted this, but denied that he ever agreed to take the claimant to a doctor. He testified that he told claimant that the timekeeper was the only one who had authority to send him to a doctor. Wisby testified that he reported the injury to the timekeeper on the day of the accident.

The record establishes that the usual method of reporting accidents on this job and similar jobs is for the injured employee to report to his immediate supervisor. The immediate supervisors of the stevedores are the gang and walking foremen. When there is a timekeeper on the job, the supervisor sends or takes the employee to the timekeeper who sends the employee to a doctor. Both the supervisor and the timekeeper are instructed to report the injury to the employer or the agent in charge.

Wisby was the man who hired the claimant, directed his work, and paid him his wages for the respondent. The only other person claimed by respondent to be in authority for it on the ship at the time of the accident was A. P. David, whose regular status was that of gearman. He testified that he was left in charge of the job

when B. D. Harris, a partner in the stevedoring firm, left the ship that day to make a trip to Houston. There is nothing in the record to indicate, and there is evidence to the contrary, that the authority claimed for David as representative of the company was known to the foremen or workmen. David had no headquarters on the job; there was no notice given of his change in status from "gearman" to agent in charge; and, during the loading operation at the time of the accident, he was in the galley talking and having coffee with the timekeeper.

It is under these circumstances that the respondent contends, and the courts below held, that the Deputy Commissioner could not find that the employer had the notice required by § 12 (d) of the Act.

This conclusion was not justified. The flash fire was a matter of common knowledge and even terror on the ship. Many witnesses saw the claimant injured or on the deck unable to walk immediately thereafter. His gang foreman knew of the injury. The walking foreman, who hired him and paid his wages, not only knew of it, but had him carried to his car and drove him home, promising, according to claimant's testimony, to later take him to a doctor. This same foreman informed the timekeeper of the injury. Exactly what the timekeeper and Mr. David were doing throughout this exciting and dangerous period does not appear in the record, but certainly they were sufficiently close to be aware of the occurrence.

The respondents would have us hold that unless the claimant can demonstrate that the employer, or the person he selects to be in charge, even another workman selected without notice to the workmen or foremen, has actual personal knowledge of the injury, the requirements of § 12 (d) are not satisfied. Such an interpretation would be indefensible.

The accepted practice on the job was for personal injuries to be reported by the injured party or his foreman

to the timekeeper. It then became the duty of the latter to procure a doctor. When Wisby reported the injury to the timekeeper, the established practice of notice to the employer was substantially complied with. Both Wisby and the timekeeper were under a duty to report the injury to the employer or his agent in charge. The Deputy Commissioner found that the claimant received a crippling injury, that he was illiterate and without instruction or knowledge as to whom to report his injury, and that the practice on the job of reporting injuries for medical assistance as recognized by the employer was followed in his case, and that the failure to supply medical assistance was due to the negligence of the employer or his agents, and that the employer was not prejudiced by the failure to give written notice. These findings are supported by the evidence in the record. Under these circumstances, we hold that the Deputy Commissioner was justified in finding that the employer had notice of the injury within the meaning of § 12 (d). The burden of any failure of these agents to report must fall on the employer, and not on a longshoreman who follows the routine the employer prescribes. Particularly is it true in this case where the claimant, who was totally illiterate and only worked as a stevedore for two days, suffered a painful and crippling injury that necessitated removing him from the job to his home.

This Act must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results. *Baltimore & P. S. B. Co.* v. *Norton*, 284 U. S. 408, 414. The Deputy Commissioner is empowered to hear and determine all questions in respect of claims under the Act. 44 Stat. 1435, 33 U. S. C. § 919 (a). The federal district courts have power to enjoin awards only if they are not "in accordance with law." 44 Stat. 1436, 33 U. S. C. § 921 (b); and see Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. § 1001 *et seq.* The

findings of the Deputy Commissioner are to be accepted unless they are unsupported by substantial evidence on the record considered as a whole. *O'Leary* v. *Brown-Pacific-Maxon*, 340 U. S. 504. Otherwise, reversal must rest on an error of law, such as a misconstruction of the Act. *Norton* v. *Warner Co.*, 321 U. S. 565. The Deputy Commissioner properly construed the law, and his findings are supported by evidence. The Act was designed to provide compensation for the included workers, regardless of whether written notice was given, where the employer has knowledge of the injury, or the employee cannot give the required written notice. Because of our conclusion, it is not necessary to determine whether the claimant could have given written notice to the employer.

The District Court also held that it would have been required to refer the case back to the Deputy Commissioner for further findings on the question of the permanence of the injury and the determination of the compensation rate. These questions, however, are not before the Court. The judgment of the Court of Appeals is reversed and the case is remanded to the District Court for such further proceedings as it deems necessary, not inconsistent with this opinion.

Reversed.

LOBER ET AL., EXECUTORS, v. UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 30. Argued October 16, 1953.—Decided November 9, 1953.

Decedent had transferred property to himself as trustee for his minor children, reserving discretionary power to invest and reinvest the principal and income, which were to be paid to the children when they attained certain ages. The trusts were declared irrevocable; but decedent reserved the right to pay over to the children at any time any or all of the trust assets. *Held:* The value of the trust assets was includable in decedent's estate for estate tax purposes, under § 811 (d)(2) of the Internal Revenue Code. Pp. 335–337.

124 Ct. Cl. 44, 108 F. Supp. 731, affirmed.

David Stock argued the cause and filed a brief for petitioners.

Charles K. Rice argued the cause for the United States. With him on the brief were *Acting Solicitor General Stern, Assistant Attorney General Holland, Ellis N. Slack, Lee A. Jackson, Marvin E. Frankel* and *Elizabeth B. Davis.*

MR. JUSTICE BLACK delivered the opinion of the Court.

This is an action for an estate tax refund brought by the executors of the estate of Morris Lober. In 1924 he signed an instrument conveying to himself as trustee money and stocks for the benefit of his young son. In 1929 he executed two other instruments, one for the benefit of a daughter, the other for a second son. The terms of these three instruments were the same. Lober was to handle the funds, invest and reinvest them as he deemed proper. He could accumulate and reinvest the income with the same freedom until his children reached twenty-one years of age. When twenty-one they were to be paid the accumulated income. Lober could hold the principal of each trust until the beneficiary reached twenty-five. In case he died

his wife was to be trustee with the same broad powers Lober had conveyed to himself. The trusts were declared to be irrevocable, and as the case reaches us we may assume that the trust instruments gave Lober's children a "vested interest" under state law, so that if they had died after creation of the trusts their interests would have passed to their estates. A crucial term of the trust instruments was that Lober could at any time he saw fit turn all or any part of the principal of the trusts over to his children. Thus he could at will reduce the principal or pay it all to the beneficiaries, thereby terminating any trusteeship over it.

Lober died in 1942. By that time the trust property was valued at more than $125,000. The Internal Revenue Commissioner treated this as Lober's property and included it in his gross estate. That inclusion brought this lawsuit. The Commissioner relied on § 811 (d)(2) of the Internal Revenue Code, 26 U. S. C. § 811 (1946 ed.). That section, so far as material here, required inclusion in a decedent's gross estate of the value of all property that the decedent had previously transferred by trust "where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power . . . to alter, amend, or revoke . . . ." In *Commissioner* v. *Holmes*, 326 U. S. 480, we held that power to terminate was the equivalent of power to "alter, amend, or revoke" it, and we approved taxation of the Holmes estate on that basis. Relying on the *Holmes* case, the Court of Claims upheld inclusion of these trust properties in Lober's estate. 124 Ct. Cl. 44, 108 F. Supp. 731. This was done despite the assumption that the trust conveyances gave the Lober children an indefeasible "vested interest" in the properties conveyed. The Fifth Circuit Court of Appeals had reached a contrary result where the circumstances were substantially the same, in *Hays' Estate* v. *Commissioner*, 181 F. 2d 169, 172–174. Because of this conflict, we granted certiorari. 345 U. S. 969.

Petitioners stress a factual difference between this and the *Holmes* case. The *Holmes* trust instrument provided that if a beneficiary died before expiration of the trust his children succeeded to his interest, but if he died without children, his interest would pass to his brothers or their children. Thus the trustee had power to eliminate a contingency that might have prevented passage of a beneficiary's interest to his heirs. Here we assume that upon death of the Lober beneficiaries their part in the trust estate would, under New York law, pass to their heirs. But we cannot agree that this difference should change the *Holmes* result.

We pointed out in the *Holmes* case that § 811 (d)(2) was more concerned with "present economic benefit" than with "technical vesting of title or estates." And the Lober beneficiaries, like the Holmes beneficiaries, were granted no "present right to immediate enjoyment of either income or principal." The trust instrument here gave none of Lober's children full "enjoyment" of the trust property, whether it "vested" in them or not. To get this full enjoyment they had to wait until they reached the age of twenty-five unless their father sooner gave them the money and stocks by terminating the trust under the power of change he kept to the very date of his death. This father could have given property to his children without reserving in himself any power to change the terms as to the date his gift would be wholly effective, but he did not. What we said in the *Holmes* case fits this situation too: "A donor who keeps so strong a hold over the actual and immediate enjoyment of what he puts beyond his own power to retake has not divested himself of that degree of control which § 811 (d)(2) requires in order to avoid the tax." *Commissioner* v. *Holmes*, *supra*, at 487.

Affirmed.

MR. JUSTICE DOUGLAS and MR. JUSTICE JACKSON dissent.

OLBERDING, DOING BUSINESS AS VESS TRANSFER CO., ET AL. *v.* ILLINOIS CENTRAL RAILROAD CO., INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 27. Argued October 15, 1953.—Decided November 9, 1953.

Basing jurisdiction solely on diversity of citizenship, an Illinois railroad corporation brought suit in a federal district court in Kentucky against an Indiana owner of a truck which, while on temporary business in Kentucky, collided with an overpass of the railroad, causing a derailment. The defendant was apprised of the action through service of process on the Secretary of State of Kentucky, in accordance with a Kentucky statute. The Kentucky statute did not require the designation of an agent for the service of process, and the defendant had made no such designation. *Held:* Under 28 U. S. C. § 1391 (a), the defendant's motion that the case be dismissed on the ground of improper venue should have been granted. Pp. 339–342.

(a) The defendant did not impliedly consent to be sued in a federal court in Kentucky simply by driving his motor vehicle on the highways of that State. Pp. 340–341.

(b) The fact that a nonresident motorist who comes into Kentucky can, consistent with the Due Process Clause of the Fourteenth Amendment, be subjected to suit in the appropriate Kentucky state court is irrelevant to his rights under 28 U. S. C. § 1391 (a). P. 341.

(c) *Neirbo Co.* v. *Bethlehem Corp.*, 308 U. S. 165, distinguished. Pp. 341–342.

201 F. 2d 582, reversed.

In a suit in a federal district court based solely on diversity of citizenship, the defendant's motion that the case be dismissed on the ground of improper venue was overruled and there was a verdict for the plaintiff. The Court of Appeals affirmed. 201 F. 2d 582. This Court granted certiorari. 345 U. S. 950. *Reversed*, p. 342.

William L. Mitchell argued the cause for petitioners. With him on the brief were *William C. Welborn* and *Milford M. Miller*.

James G. Wheeler argued the cause for respondent. With him on the brief were *Joseph H. Wright, Chas. A. Helsell, John W. Freels* and *Thomas J. Marshall, Jr.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

For present purposes the facts may be briefly stated. The railroad brought suit in the United States District Court for the Western District of Kentucky against Olberding, the owner of a truck, which, while on temporary business in Kentucky, collided with an overpass of the railroad, causing a subsequent derailment. Jurisdiction was based on diversity of citizenship, plaintiff being an Illinois corporation and Olberding a citizen of Indiana. Olberding was apprised of the action through service of process on the Secretary of State in Frankfort, Kentucky, according to the Kentucky Non-resident Motorist Statute.* He entered a special appearance and moved that the case be dismissed on the ground of improper venue. The motion was overruled and the case went to trial, resulting in a verdict for the plaintiff. The Court of Appeals for the Sixth Circuit affirmed, 201 F. 2d 582. Its ruling on venue, in the situation here presented, is in direct conflict with that of the First Circuit in *Martin*

*Ky. Rev. Stat., 1953, §§ 188.020–188.030. The Kentucky statute, like the one upheld in *Hess* v. *Pawloski*, 274 U. S. 352, in substance provides that a non-resident motorist who operates his automobile on the state's highways makes the Secretary of State his agent for service of process in any civil action arising out of such operation. There is also set up a procedure for serving the summons on the Secretary of State, who in turn is to notify the non-resident defendant by registered mail.

On the other hand, the statute under consideration in *Kane* v. *New Jersey*, 242 U. S. 160, specifically required the non-resident motorist to register his vehicle annually and formally to designate the Secretary of State an agent upon whom process might be served. Penalties were provided for use of the state's roads without complying with these requirements.

v. *Fischbach Trucking Co.*, 183 F. 2d 53, with which the Third Circuit has recently agreed, *McCoy* v. *Siler*, 205 F. 2d 498. To resolve the conflict, we granted certiorari. 345 U. S. 950.

This is a horse soon curried. Congress, in conferring jurisdiction on the district courts in cases based solely on diversity of citizenship, has been explicit to confine such suits to "the judicial district where all plaintiffs or all defendants reside." 28 U. S. C. § 1391 (a). This is not a qualification upon the power of the court to adjudicate, but a limitation designed for the convenience of litigants, and, as such, may be waived by them. The plaintiff, by bringing the suit in a district other than that authorized by the statute, relinquished his right to object to the venue. But unless the defendant has also consented to be sued in that district, he has a right to invoke the protection which Congress has afforded him. The requirement of venue is specific and unambiguous; it is not one of those vague principles which, in the interest of some overriding policy, is to be given a "liberal" construction.

It is not claimed that either the corporate plaintiff or the individual defendant here was a "resident" of Kentucky. The sole reason why the plaintiff was allowed to bring this action in the federal court of Kentucky was that a consent to be sued in that state was attributed to the defendant. And this attribution was then made the basis of a waiver of his rights under the federal venue provision. Concededly the defendant did not in fact consent. He impliedly consented, so the argument runs, to be sued in the federal court of Kentucky simply by driving his automobile on the highways of Kentucky, which has the familiar statute holding non-resident motorists amenable to suit for accidents caused by their negligent operations within the State.

It is true that in order to ease the process by which new decisions are fitted into pre-existing modes of analy-

sis there has been some fictive talk to the effect that the reason why a non-resident can be subjected to a state's jurisdiction is that the non-resident has "impliedly" consented to be sued there. In point of fact, however, jurisdiction in these cases does not rest on consent at all. See Scott, Jurisdiction over Nonresident Motorists, 39 Harv. L. Rev. 563. The defendant may protest to high heaven his unwillingness to be sued and it avails him not. The liability rests on the inroad which the automobile has made on the decision of *Pennoyer* v. *Neff*, 95 U. S. 714, as it has on so many aspects of our social scene. The potentialities of damage by a motorist, in a population as mobile as ours, are such that those whom he injures must have opportunities of redress against him provided only that he is afforded an opportunity to defend himself. We have held that this is a fair rule of law as between a resident injured party (for whose protection these statutes are primarily intended) and a non-resident motorist, and that the requirements of due process are therefore met. *Hess* v. *Pawloski*, 274 U. S. 352. But to conclude from this holding that the motorist, who never consented to anything and whose consent is altogether immaterial, has actually agreed to be sued and has thus waived his federal venue rights is surely to move in the world of Alice in Wonderland. The fact that a non-resident motorist who comes into Kentucky can, consistent with the Due Process Clause of the Fourteenth Amendment, be subjected to suit in the appropriate Kentucky state court has nothing whatever to do with his rights under 28 U. S. C. § 1391 (a).

This conclusion is entirely loyal to the decision and reasoning of *Neirbo Co.* v. *Bethlehem Corp.*, 308 U. S. 165. There the defendant, a Delaware corporation, was sued by a non-resident of New York in the United States District Court for the Southern District of New York, and we found the venue requirements of what is now 28 U. S. C. § 1391 (a) satisfied because Bethlehem had designated

an agent in New York "upon whom a summons may be served within the State of New York." 308 U. S., at 175. We held that this constituted an "actual consent" to be sued in New York, not the less so because it was "part of the bargain by which Bethlehem enjoys the business freedom of the State of New York." *Ibid.* We further held, following *Ex parte Schollenberger*, 96 U. S. 369, 377, that this consent extended to all courts sitting in New York, both federal and state. Of course this doctrine would equally apply to an individual defendant in situations where a state may validly require the designation of an agent for service of process as a condition of carrying on activities within its borders, and such designation has in fact been made. See *Kane* v. *New Jersey*, 242 U. S. 160. But here no such designation was required or made, and hence the *Neirbo* case has no applicability.

The judgment is

Reversed.

MR. JUSTICE DOUGLAS concurs in the result.

MR. JUSTICE REED, with whom MR. JUSTICE MINTON joins, dissenting.

The unfortunate effect of this decision on federal venue, its uniformity and availability, in so important a field as torts by out-of-state motorists, causes me to dissent from the views of the Court. Under *Neirbo Co.* v. *Bethlehem Corp.*, 308 U. S. 165, a different doctrine of venue would be applied to motor torts committed by foreign corporations doing business in a state than is applied to an individual motorist driving his own car through a state. From the opinion I would assume that a corporation not doing business in a state but causing a car to be driven therein would be immune from suits for torts in the federal courts in that state. The decision bars a nonresident injured party from seeking damages, on allegation of

diversity, from a nonresident motor operator or owner in the United States District Court having jurisdiction over the place of the accident in which the motor vehicle is involved.

No question is or can now be raised against the constitutionality of the Kentucky statute to secure the presence of an out-of-state motorist in the state courts to respond to damages. It is the form generally approved for protection against out-of-state wrongdoers by motor operation, and is not subject to attack for lack of due process.[1] The

[1] *Hess* v. *Pawloski*, 274 U. S. 352. The statute there involved so far as pertinent read:

"The acceptance by a non-resident of the rights and privileges conferred by section three or four, as evidenced by his operating a motor vehicle thereunder, or the operation by a non-resident of a motor vehicle on a public way in the commonwealth other than under said sections, shall be deemed equivalent to an appointment by such non-resident of the registrar or his successor in office, to be his true and lawful attorney upon whom may be served all lawful processes in any action or proceeding against him, growing out of any accident or collision in which said non-resident may be involved while operating a motor vehicle on such a way, and said acceptance or operation shall be a signification of his agreement that any such process against him which is so served shall be of the same legal force and validity as if served on him personally." Mass. Acts 1923, c. 431, § 2.

In *Neirbo Co.* v. *Bethlehem Corp.*, 308 U. S. 165, the provision was for a designation by the corporation "of the secretary of state as its agent upon whom all process in any action or proceedings against it may be served within this state." McKinney's N. Y. Laws, Gen. Corp. Law, § 210.

The Kentucky statute in this case reads:

"Any nonresident operator or owner of any motor vehicle who accepts the privilege extended by the laws of this state to nonresidents to operate motor vehicles or have them operated within this state shall, by such acceptance and by the operation of such motor vehicle within this state, make the Secretary of State his agent for the service of process in any civil action instituted in the courts of this state against the operator or owner arising out of or by reason of any accident or collision or damage occurring within this state in which the motor vehicle is involved." Ky. Rev. Stat., 1953, § 188.020.

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single issue decided by the Court is that such process does not waive venue under 28 U. S. C. § 1391 (a):

> "A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside."

The provision was substantially the same when the *Neirbo* case was decided. The clause then read:

> ". . . but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suits shall be brought only in the district of the residence of either the plaintiff or the defendant." 28 U. S. C. (1946 ed.) § 112.

In *Neirbo* we held that since the foreign corporation had consented to be sued in the courts of the state, the consent extended to the federal courts sitting in the state. 308 U. S., at 171, 175. The same reasoning that led to the subjection of foreign corporations to federal litigation in the *Neirbo* case leads me to the conclusion that the out-of-state motorist should likewise be so held. The motor car has lengthened the radius of the individual's activities. We have upheld the constitutional power of the states to compel redress of wrongs, through the use of the automobile, at the place of their happening. It is done through the consent of the party benefiting from his privilege to use the highways of the state. The District Courts have consistently ruled that the appointment of an agent for service of process by driving on state highways is a waiver of federal venue.[2]

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[2] *Falter* v. *Southwest Wheel Co.*, 109 F. Supp. 556; *Archambeau* v. *Emerson*, 108 F. Supp. 28; *Jacobson* v. *Schuman*, 105 F. Supp. 483; *Kostamo* v. *Brorby*, 95 F. Supp. 806; *Burnett* v. *Swenson*, 95 F. Supp. 524; *Thurman* v. *Consolidated School Dist.*, 94 F. Supp. 616; *Urso* v. *Scales*, 90 F. Supp. 653; *Steele* v. *Dennis*, 62 F. Supp. 73; *Krueger* v. *Hider*, 48 F. Supp. 708. Contra: *Waters* v. *Plyborn*, 93 F. Supp. 651.

I see no difference of substance between the signing of a paper under the New York statute upon which *Neirbo* is based and the acceptance, by action in driving a motor car, of the privilege of using state highways under the Kentucky statute. In each case there was no federal venue except by waiver and consent. Both the Bethlehem Corporation and this out-of-state motorist, in my opinion, waived objection to federal venue. The *Hess* case determined that the difference between the "formal and implied appointment" of an agent for service "is not substantial" under the Due Process Clause. 274 U. S., at 357.[3] The *Neirbo* case held that consent to service on an agent for service of process waived objection to federal venue. The same rule if applied to this situation would achieve a like desirable result, trial at the logical place, the location of the incident that gives rise to the cause of action.

I would affirm the judgment.

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[3] Cf. *Knott Corp.* v. *Furman*, 163 F. 2d 199. In this case plaintiff, a citizen of Massachusetts, sued the corporation in the United States District Court for the Eastern District of Virginia, for injuries received during a hotel fire. The defendant, a Delaware corporation, operated the hotel on a United States military reservation. No written appointment of any state officer as agent for service of process had been filed by the corporation. Venue was challenged and the Fourth Circuit ruled that the corporation had waived the federal venue provisions under a statute which read:

"3. If any such company shall do business in this State without having appointed the Secretary of the Commonwealth its true and lawful attorney as required herein, it shall by doing such business in the State of Virginia be deemed to have thereby appointed the Secretary of the Commonwealth its true and lawful attorney for the purposes hereinafter set forth." Va. Code, Supp. 1946, § 3846a.

The language of this statute is certainly analogous to that of the Kentucky statute, n. 1, *supra*.

ATCHISON, TOPEKA & SANTA FE RAILWAY CO. *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA ET AL.

NO. 22. APPEAL FROM THE SUPREME COURT OF CALIFORNIA.*

Argued October 14, 1953.—Decided November 9, 1953.

The Public Utilities Commission of California entered orders, pursuant to a state statute, authorizing certain grade separation improvements, and requiring in each case that 50% of the costs be borne by the railroad. The improvements were designed to meet local transportation needs and to promote public safety and convenience, and were made necessary by the growth of the communities affected. There was no showing on the record in either case of arbitrariness or unreasonableness in the Commission's orders, and none was claimed except that the Commission refused to allocate costs on the basis of benefits to the railroads. *Held:* The orders of the Commission are not arbitrary or unreasonable and do not deprive the railroads of their property without due process of law, nor do they interfere unreasonably with interstate commerce. Pp. 347–355.

(a) In sustaining the Commission's orders by denying writs of review, the State Supreme Court upheld the statute as applied by the Commission, and the cases are properly here on appeal under 28 U. S. C. § 1257 (2). Pp. 348–349.

(b) The railroads were not entitled to have the costs of the improvements allocated only on the basis of benefits which will accrue to their property. Pp. 352–354.

(c) *Nashville, C. & St. L. R. Co.* v. *Walters,* 294 U. S. 405, distinguished. Pp. 353–354.

(d) The allocation of costs against the railroads in excess of benefits received did not constitute an undue burden on interstate commerce. P. 355.

Affirmed.

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*Together with No. 43, *Southern Pacific Co.* v. *Public Utilities Commission of California et al.*, argued October 14–15, 1953, also on appeal from the same court.

In each of these cases the Public Utilities Commission of California entered orders authorizing certain grade separation improvements and allocating a share of the cost to the railroad. 51 Cal. P. U. C. 771, 788. The State Supreme Court denied review. On appeal to this Court, *affirmed*, p. 355.

Douglas F. Smith argued the cause for appellant in No. 22 and *Burton Mason* argued the cause for appellant in No. 43. With them on a joint brief were *Jonathan C. Gibson, R. S. Outlaw, Robert W. Walker, Kenneth F. Burgess* and *Arthur R. Seder, Jr.* for appellant in No. 22, and *George L. Buland, E. J. Foulds* and *Randolph Karr* for appellant in No. 43.

Roger Arnebergh argued the cause for appellees in No. 22. With him on the briefs were *Bourke Jones* for the City of Los Angeles, appellee in that case, and *Henry McClernan* and *John H. Lauten* for the City of Glendale in No. 43. *Ray L. Chesebro* was also with them on statements opposing jurisdiction and motions to dismiss or affirm.

Hal F. Wiggins argued the cause for appellees in No. 43. With him on the briefs was *Everett C. McKeage* for the Public Utilities Commission.

MR. JUSTICE MINTON delivered the opinion of the Court.

These cases present the same questions of law and will be disposed of together. The Public Utilities Commission of California entered orders[1] authorizing the construction of certain grade separation improvements and allocating the costs therefor, pursuant to § 1202 of the

[1] The final orders may be found at 51 Cal. P. U. C. 771 and 51 Cal. P. U. C. 788.

Public Utilities Code of California.[6] On petitions to the Supreme Court of California, that court denied review of the Commission's orders,[7] and these appeals followed. We postponed jurisdiction until a hearing on the merits.

We think the Commission's orders must be treated as an act of the legislature for purposes of determining our jurisdiction under 28 U. S. C. § 1257 (2). *Live Oak Water Users' Assn.* v. *Railroad Commission*, 269 U. S. 354, 356; *Lake Erie & Western R. Co.* v. *Public Utilities Commission*, 249 U. S. 422, 424. The Commission has construed § 1202 as authorizing these orders. The appellants presented squarely to the Supreme Court of California their contention that in the allocation of costs, these orders take their property without due process of law and are so arbitrary and burdensome as to constitute an interference with interstate commerce, in violation of

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[6] "§ 1202. Exclusive powers of commission. The commission has the exclusive power:

"(a) To determine and prescribe the manner, including the particular point of crossing, and the terms of installation, operation, maintenance, use, and protection of each crossing of one railroad by another railroad or street railroad, and of a street railroad by a railroad, and of each crossing of a public or publicly used road or highway by a railroad or street railroad, and of a street by a railroad or vice versa, subject to the provisions of Sections 1121 to 1127, inclusive, of the Streets and Highways Code so far as applicable.

"(b) To alter, relocate, or abolish by physical closing any such crossing heretofore or hereafter established.

"(c) To require, where in its judgment it would be practicable, a separation of grades at any such crossing heretofore or hereafter established and to prescribe the terms upon which such separation shall be made and the proportions in which the expense of the construction, alteration, relocation, or abolition of such crossings or the separation of such grades shall be divided between the railroad or street railroad corporations affected or between such corporations and the State, county, city, or other political subdivision affected." Deering's Cal. Pub. U. C. A., 1951.

[7] 40 Adv. Cal., No. 2, Minutes, 1; 40 Adv. Cal., No. 15, Minutes, 1.

the Constitution of the United States. In sustaining the Commission's orders by denying writs of review, the Supreme Court of California upheld the statute as applied by the Commission, and the cases are properly here on appeal. *Kansas City S. R. Co.* v. *Road Improvement District*, 256 U. S. 658, 659–660.

The principal question presented by these appeals is whether the allocation of the reasonable cost of grade separation improvements is arbitrary as to the railroads unless imposed on the basis of benefits received, or, since the costs are incurred in the exercise of the police power in the interest of public safety, convenience and necessity, may they be allocated on the basis of fairness and reasonableness.

No. 22.

In this case, the Commission authorized the enlarging of two existing railroad underpasses where the Santa Fe tracks cross Washington Boulevard in Los Angeles. These underpasses were constructed in 1914 under an agreement between the railroad and the City providing that each party was to pay one-half of the cost. The Commission found the structures to be 75% depreciated. When constructed, their chief utility was to facilitate access to a garbage reduction plant. Washington Boulevard is now one of the main east and west thoroughfares of Los Angeles, and other streets and highways feed into it. It is not a part of the State highway system nor is it a freeway. The grade separations concerned here are in one of the principal industrial districts of the City and are a traffic bottleneck. For most of its length, Washington Boulevard is 60 feet wide, but at the site in question, the roadway narrows to 20 feet, with a vertical clearance of less than 14 feet. The City's easement at this point is 90 feet. As improved, two 33-foot roadways and two 7-foot sidewalks will be provided, and the underpasses will be heightened. The improvement is being made to

promote the safety and convenience of the public and to meet vastly increased local transportation needs, made necessary by the rapid growth of the City. In 1910 the City had a population of 102,000, in 1920 of 576,000, and in 1948 of 1,987,000. Los Angeles County's population in 1910 was 504,000 and in 1948 was over four million. Vehicular traffic in the area has increased tremendously since construction of the present underpasses in 1914.

Considering all of these facts and evidence by the railroad that there were no benefits to be derived by the railroad from this improvement, the Commission decided that there "is a need for widening and increasing the height of the existing underpasses," [4] and that the preferred plan submitted by the City of Los Angeles "sets out the construction which would be most practicable and best meet the public safety, convenience and necessity in this matter." [5] The Commission found that $569,355 of the cost was attributable to the presence of the railroad tracks and that the railroad should pay 50% of this amount and the City 50%.

No. 43.

This case does not differ materially from Case No. 22 except that here a grade crossing will be replaced by an underpass. Los Feliz Boulevard runs in a northeast-southwest direction, crossing at grade five Southern Pacific tracks approximately at the boundary of the cities of Los Angeles and Glendale. The street becomes known as Los Feliz Road in Glendale. Los Feliz is not a part of the State highway system nor is it a freeway, but, like Washington Boulevard, is an access street for adjacent properties and for other streets feeding into it in this congested area and as a through street has reached capacity. When the crossing is blocked by trains, 38 or more

[4] 51 Cal. P. U. C. 771, 779.

[5] *Ibid.*

vehicles may back up in each of three lanes, causing a "backlash" on San Fernando Road, 820 feet distant. The crossing now has manually-operated crossing gates, and several relatively minor accidents have occurred there during the last 25 years. The plan approved by the Commission passes the street under the railroad tracks, with two 40-foot roadways, separated by a median strip and with 5-foot sidewalks on each side. The structure when completed will be 105 feet wide. The total cost necessitated by the presence of the tracks was estimated at $1,493,200. The Commission ordered that 50% be borne by the railroad, 25% by Los Angeles County, and 12½% each by the cities of Los Angeles and Glendale. Construction of the grade separation was found by the Commission to be "in the interest of public safety, convenience and necessity . . . ."[6]

In each of these cases, the railroads introduced evidence intended to show that their share of the costs should be based on benefits received and that they would receive little or no benefit from the construction. For the most part, this evidence related to the nature of the traffic on the boulevards, the fact that the improvements are required primarily to facilitate traffic flow on the streets, the "revolution" in transportation that has occurred since the early part of this century and its effect on the reasons for constructing grade separations and on the financial position of railroads, the competition afforded railroads by motor vehicles utilizing the public streets and highways, and the effect of the proposed construction on operation of the railroads. The appellants contended that the costs should be distributed on the basis of benefits, and since the railroads would receive little or no benefits, they should be required to pay only a small part of the costs or nothing, as the case may be. The cities contended in both cases that the railroads should bear all the costs attribut-

[6] 51 Cal. P. U. C. 788, 795.

able to the presence of the tracks. After lengthy hearings and after considering all the evidence and the arguments advanced, the Commission decided that it was not bound to follow any particular theory in apportioning the costs but may allocate the costs in the exercise of its sound discretion.

We do not understand the appellants to contest the right of the Commission to enter the orders or the reasonableness of the estimated costs. Their principal contention is that as to them the cost of the improvements may be distributed only on the basis of benefits which will accrue to their property. In this contention, we think the appellants are in error. These were not improvements whose purpose and end result is to enhance the value of the property involved by reason of the added facilities, such as street, sewer or drainage projects, where the costs assessed must bear some relationship to the benefits received. *Chesebro* v. *Los Angeles County Dist.*, 306 U. S. 459; *Valley Farms Co.* v. *Westchester*, 261 U. S. 155; *Kansas City S. R. Co.* v. *Road Improvement District, supra; Gast Realty & Investment Co.* v. *Schneider Granite Co.*, 240 U. S. 55.

Rather, in the cases at bar, the improvements were instituted by the State or its subdivisions to meet local transportation needs and further safety and convenience, made necessary by the rapid growth of the communities. In such circumstances, this Court has consistently held that in the exercise of the police power, the cost of such improvements *may be* allocated all to the railroads. *Erie R. Co.* v. *Board*, 254 U. S. 394, 409–411; *Missouri Pacific R. Co.* v. *Omaha*, 235 U. S. 121, 127; *Chicago, M. & St. P. R. Co.* v. *Minneapolis*, 232 U. S. 430, 441; *Cincinnati, I. & W. R. Co.* v. *Connersville*, 218 U. S. 336, 344. There is the proper limitation that such allocation of costs must be fair and reasonable. *Nashville, C. & St. L. R. Co.* v. *Walters*, 294 U. S. 405, 415, and the cases there cited. This was the standard applied by the Commission. It

was not an arbitrary exercise of power by the Commission to refuse to allocate costs on the basis of benefits alone. The railroad tracks are in the streets not as a matter of right but by permission from the State or its subdivisions. The presence of these tracks in the streets creates the burden of constructing grade separations in the interest of public safety and convenience. Having brought about the problem, the railroads are in no position to complain because their share in the cost of alleviating it is not based solely on the special benefits accruing to them from the improvements.

The appellants rely heavily on the *Nashville* case, *supra*, but that decision is in accord with the long-established rule which we here follow and which the Commission applied. As this Court said in the *Nashville* case: "The claim of unconstitutionality rests wholly upon the special facts here shown." P. 413. In that case, the railroad's share of the cost was fixed at 50% by a Tennessee statute and no consideration was given by the Supreme Court of Tennessee as to whether the application of the statutory amount was unreasonable under the special facts advanced. The grade separation ordered in the *Nashville* case was located in the rural community of Lexington, Tennessee, which had a population in 1910 of 1,497, in 1920 of 1,792, and in 1930 of 1,823. The improvement was not required to meet the transportation needs of Lexington and was being constructed without regard to that community's growth or to considerations of public safety and convenience resulting from such growth. The highway there under improvement was part of the State highway system and the grade was to be removed primarily as part of economic and engineering planning and to qualify the improvement of the highway for federal aid. Other facts offered pointed principally to the state and nation-wide nature of the highway system and the particular highway there involved, the competition afforded railroads by the users of such highways and

the effect of such competition on the revenues of the railroads, and the increasing importance of grade separations as a means of assuring rapid movement of motor vehicles rather than as an exclusively safety measure.

As stated by this Court, "[t]he main contention is that to impose upon the Railway, under these circumstances, one-half of the cost is action so arbitrary and unreasonable as to deprive it of property without due process of law in violation of the Fourteenth Amendment." P. 413. Thus, the contention of the railroad and the rule recognized by this Court in the *Nashville* opinion was that there could be an allocation of costs subject to the limitation that they be allocated always with regard to the rule against unreasonableness and arbitrariness. The judgment of the Supreme Court of Tennessee was reversed and the case remanded thereto because that court had refused to consider whether the special facts shown "were of such persuasiveness as to have required the state court to hold that the statute and order complained of are arbitrary and unreasonable. That determination should, in the first instance, be made by the Supreme Court of the State." Pp. 432–433.

In our cases, not only are the facts distinguishable in many material particulars but unlike the Supreme Court of Tennessee which refused to consider the facts to determine whether the statute's allocation of 50% was arbitrary or unreasonable, the California Commission considered all the evidence offered, including that going to the benefits received, and properly applied the rule of allocation sanctioned by this Court, and the California Supreme Court found no occasion to review the Commission's orders. There is no showing on these records of arbitrariness or unreasonableness in the Commission's orders, and none is claimed except as the Commission refused to allocate costs on the basis of benefits received, which we hold it was not required to do.

It is next contended that the allocation of grade separation costs against the railroads in excess of benefits received constitutes an undue burden on interstate commerce. We have decided that there is no showing that the orders here under attack were arbitrary or unreasonable. Certainly, if the Commission has the right to order these improvements and has not, in allocating the costs, acted so arbitrarily as to deprive the railroads of their property without due process of law, the fact that the improvements may interfere with interstate commerce is incidental. The construction and use of public streets is a matter peculiarly of local concern and great leeway is allowed local authorities where there is no conflicting federal regulation, even though interstate commerce be subject to material interference. *Railway Express Agency* v. *New York*, 336 U. S. 106, 111; *South Carolina* v. *Barnwell Bros.*, 303 U. S. 177, 187. No conflict with federal regulation is involved here. See *Lehigh Valley R. Co.* v. *Board*, 278 U. S. 24, 35.

When the appellants went on the streets in question, they assumed the burden of sharing on a fair and reasonable basis the costs of any changes for the reason of public safety and convenience made necessary by the growth of the communities.

> "To engage in interstate commerce the railroad must get on to the land and to get on to it must comply with the conditions imposed by the State for the safety of its citizens." *Erie R. Co.* v. *Board, supra,* p. 411.

The orders of the Commission are not arbitrary or unreasonable and do not deprive the appellants of their property without due process of law, nor do they interfere unreasonably with interstate commerce.

The judgments of the Supreme Court of California are

Affirmed.

THE CHIEF JUSTICE took no part in the consideration or decision of these cases.

TOOLSON *v.* NEW YORK YANKEES, INC. ET AL.

NO. 18. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.*

Argued October 13, 1953.—Decided November 9, 1953.

The judgments in these cases are affirmed on the authority of *Federal Baseball Club of Baltimore* v. *National League of Professional Baseball Clubs*, 259 U. S. 200, so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws. Pp. 350–357. 200 F. 2d 198, 202 F. 2d 413, 428, affirmed.

Howard C. Parke argued the cause for petitioner in No. 18. With him on the brief was *Gene M. Harris.*

Frederic A. Johnson argued the cause for petitioner in No. 23 and *Seymour Martinson* argued the cause for petitioners in No. 25. With them on the briefs were *Maurice H. Koodish* and *Edward Martinson.*

Norman S. Sterry argued the cause and filed a brief for respondents in No. 18.

Raymond T. Jackson argued the cause for respondents in Nos. 23 and 25. With him on the briefs were *Benjamin F. Fiery* and *Louis F. Carroll.*

Thomas Reed Powell filed a brief for the Boston American League Base Ball Company in No. 18, as *amicus curiae*, urging affirmance.

PER CURIAM.

In *Federal Baseball Club of Baltimore* v. *National League of Professional Baseball Clubs*, 259 U. S. 200

*Together with No. 23, *Kowalski* v. *Chandler, Commissioner of Baseball, et al.*, argued October 13–14, 1953, and No. 25, *Corbett et al.* v. *Chandler, Commissioner of Baseball, et al.*, argued October 14, 1953, both on certiorari to the United States Court of Appeals for the Sixth Circuit.

(1922), this Court held that the business of providing public baseball games for profit between clubs of professional baseball players was not within the scope of the federal antitrust laws. Congress has had the ruling under consideration but has not seen fit to bring such business under these laws by legislation having prospective effect. The business has thus been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation. The present cases ask us to overrule the prior decision and, with retrospective effect, hold the legislation applicable. We think that if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation. Without re-examination of the underlying issues, the judgments below are affirmed on the authority of *Federal Baseball Club of Baltimore* v. *National League of Professional Baseball Clubs, supra,* so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws.

Affirmed.

MR. JUSTICE BURTON, with whom MR. JUSTICE REED concurs, dissenting.

Whatever may have been the situation when the *Federal Baseball Club* case [1] was decided in 1922, I am not able to join today's decision which, in effect, announces that organized baseball, in 1953, still is not engaged in interstate trade or commerce. In the light of organized baseball's well-known and widely distributed capital investments used in conducting competitions between teams constantly traveling between states, its receipts and expenditures of large sums transmitted between states, its numerous purchases of materials in interstate commerce,

[1] *Federal Baseball Club* v. *National League*, 259 U. S. 200.

the attendance at its local exhibitions of large audiences often traveling across state lines, its radio and television activities which expand its audiences beyond state lines, its sponsorship of interstate advertising, and its highly organized "farm system" of minor league baseball clubs, coupled with restrictive contracts and understandings between individuals and among clubs or leagues playing for profit throughout the United States, and even in Canada, Mexico and Cuba, it is a contradiction in terms to say that the defendants in the cases before us are not now engaged in interstate trade or commerce as those terms are used in the Constitution of the United States and in the Sherman Act.[2]

In 1952 the Subcommittee on Study of Monopoly Power, of the House of Representatives Committee on the Judiciary, after extended hearings, issued a report dealing with organized baseball in relation to the Sherman Act. In that report it said:

> " 'Organized baseball' is a combination of approximately 380 separate baseball clubs, operating in 42 different States, the District of Columbia, Canada, Cuba, and Mexico . . . .
>
> "Inherently, professional baseball is intercity, intersectional, and interstate. At the beginning of the 1951 season, the clubs within organized baseball were divided among 52 different leagues. Each league is an unincorporated association of from 6 to 10 clubs which play championship baseball games among

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[2] Compare *Paul* v. *Virginia*, 8 Wall. 168, and *Hooper* v. *California*, 155 U. S. 648, with *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533, and *Lorain Journal Co.* v. *United States*, 342 U. S. 143. See also, *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594; *United States* v. *National Assn. of Real Estate Boards*, 339 U. S. 485; *United States* v. *Crescent Amusement Co.*, 323 U. S. 173; *American Medical Assn.* v. *United States*, 317 U. S. 519.

themselves according to a prearranged schedule. Such a league organization is essential for the successful operation of baseball as a business.

. . . . .

"Of the 52 leagues associated within organized baseball in 1951, 39 were interstate in nature." [2]

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[2] H. R. Rep. No. 2002, 82d Cong., 2d Sess. 4, 5.

"The primary sources of revenue for baseball clubs are admissions, radio and television, and concessions. The following table indicates the combined revenue of the 16 major-league clubs from these sources for the years 1929, 1939, and 1950.

"*Major league revenue*

"[In thousands of dollars]

"Source of revenue	1929 [1]	1939	1950
Home games	6,559.1	6,766.6	18,334.8
Road games	2,221.4	2,320.2	4,517.8
Exhibition games	422.6	515.7	911.5
Radio and television	0	884.5	3,365.5
Concessions (net)	582.8	850.3	2,936.3
Other	733.4	776.0	1,969.6
Gross receipts	10,519.5	12,113.3	32,035.5

"[1] Data unavailable for 2 clubs: Chicago, American League; and Pittsburgh, National League.

. . . . .

"The fastest-growing source of revenue for major league clubs is radio and television. Receipts from these media of interstate commerce were nonexistent in 1929. In 1939, 7.3 percent of the clubs' revenue came from this source; and in 1950, this share rose to 10.5 percent.

"Portrayed in absolute terms, the growing importance of radio and television becomes even more pronounced. Receipts rose from nothing in 1929 to $884,500 in 1939 and $3,365,500 in 1950. Reported income from primary radio and television contracts for 1951 indicate that this sharp increase is continuing. . . . To this must be added $110,000 for the sale of radio and television rights to the 1951 all-star game and $1,075,000 for the sale of similar rights to the 1951 world series." *Id.*, at 5–6.

In the *Federal Baseball Club* case the Court did not state that even if the activities of organized baseball amounted to interstate trade or commerce those activities were exempt from the Sherman Act. The Court acted on its determination that the activities before it did not amount to interstate commerce. The Court of Appeals for the District of Columbia, in that case, in 1920, described a major league baseball game as "local in its beginning and in its end." [4] This Court stated that "The business is giving exhibitions of base ball, which are purely state affairs," and the transportation of players and equipment between states "is a mere incident . . . ." [5] The main thrust of the argument of counsel for organized baseball, both in the Court of Appeals and in this Court, was in support of that proposition.[6] Although counsel did argue that the activities of organized baseball, even if amounting to interstate commerce, did not violate the Sherman Act,[7] the Court significantly refrained from expressing its opinion on that issue.

That the Court realized that the then incidental interstate features of organized baseball might rise to a magnitude that would compel recognition of them independently is indicated by the statement made in 1923 by Mr. Justice Holmes, the writer of the Court's opinion in the *Federal Baseball Club* case. In 1923, in considering a bill in equity alleging a violation of the Sherman Act by parties presenting local exhibitions on an interstate vaudeville circuit, the Court held that the bill should be considered on its merits and, in writing for the Court,

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[4] *National League* v. *Federal Baseball Club*, 50 App. D. C. 165, 169, 269 F. 681, 685.

[5] 259 U. S., at 208, 209.

[6] See brief for appellants in the Court of Appeals, pp. 45–67; brief for defendants in error in this Court, pp. 45–66.

[7] See brief for appellants in Court of Appeals, pp. 68–72; brief for defendants in error in this Court, pp. 66–72.

Mr. Justice Holmes said "The bill was brought before the decision of the *Base Ball Club Case*, and it may be that what in general is incidental, in some instances may rise to a magnitude that requires it to be considered independently." [8]

The 1952 report of the Congressional Subcommittee previously mentioned also said:

> "Under judicial interpretations of this constitutional provision [the commerce clause], the Congress has power to investigate, and pass legislation dealing with professional baseball, or more particularly 'organized baseball,' if that business is, or affects, interstate commerce.
>
> . . . . . .
>
> "After full review of all of the foregoing facts and with due consideration of modern judicial interpretation of the scope of the commerce clause, it is the studied judgment of the Subcommittee on the Study of Monopoly Power that the Congress has jurisdiction to investigate and legislate on the subject of professional baseball." H. R. Rep. No. 2002, 82d Cong., 2d Sess. 4, 7, and see 111–139.[9]

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[8] *Hart* v. *Keith Vaudeville Exchange*, 262 U. S. 271, 274, and see *North American Co.* v. *S. E. C.*, 327 U. S. 686, 694.

[9] In opposing approval of four exclusionary bills then pending, the Subcommittee did not take the stand that organized baseball and other comparable sports, although constituting interstate trade or commerce, already are exempt from the broad coverage of the Sherman Act. On the contrary, it said:

"Four bills have been introduced in the Congress, three in the House, one in the Senate, intending to give baseball and all other professional sports a complete and unlimited immunity from the antitrust laws. The requested exemption would extend to all professional sports enterprises and to all acts in the conduct of such enterprises. The law would no longer require competition in any facet of business activity of any sport enterprise. Thus the sale

In cases Nos. 18 and 23 the plaintiffs here allege that they are professional baseball players who have been damaged by enforcement of the standard "reserve clause" in their contracts pursuant to nationwide agreements among the defendants.[10] In effect they charge that in

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of radio and television rights, the management of stadia, the purchase and sale of advertising, the concession industry, and many other business activities, as well as the aspects of baseball which are solely related to the promotion of competition on the playing field, would be immune and untouchable. Such a broad exemption could not be granted without substantially repealing the antitrust laws." *Id.*, at 230.

[10] "The reserve clause is popularly believed to be some provision in the player contract which gives to the club in organized baseball which first signs a player a continuing and exclusive right to his services. Commissioner Frick testified that this popular understanding was essentially correct. He pointed out, however, that the reserve clause is not merely a provision in the contract, but also incorporates a reticulated system of rules and regulations which enable, indeed require, the entire baseball organization to respect and enforce each club's exclusive and continuous right to the services of its players." H. R. Rep. No. 2002, 82d Cong., 2d Sess. 111. See also, Section VII, The Reserve Clause, *id.*, at 111–139, and *Gardella* v. *Chandler*, 172 F. 2d 402.

In No. 18 the following specific allegations appear and those in No. 23 are comparable:

"XI.

"That the Defendants, and each of them, have entered into or agreed to be bound by a contract in the restraint of Interstate Commerce; that said contract is designated as the Major-Minor League Agreement, dated December 6, 1946, and provides in effect that:

"1. All players' contracts in the Major Leagues shall be of one form and that all players' contracts in the Minor Leagues shall be of one form.

"2. That all players' contracts in any league must provide that the Club or any assignee thereof shall have the option to renew the player's contract each year and that the player shall not play for any other club but the club with which he has a contract or the assignee thereof.

"3. That each club shall, on or before a certain date each year, designate a reserve list of active and eligible players which it desires

violation of the Sherman Act, organized baseball, through its illegal monopoly and unreasonable restraints of trade, exploits the players who attract the profits for the benefit of the clubs and leagues. Similarly, in No. 25, the

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to reserve for the ensuing year. That no player on such a reserve list may thereafter be eligible to play for any other club until his contract has been assigned or until he has been released.

"4. That the player shall be bound by any assignment of his contract by the club, and that his remuneration shall be the same as that usually paid by the assignee club to other players of like ability.

"5. That there shall be no negotiations between a player and any other club from the one which he is under contract or reservation respecting employment either present or prospective unless the Club with which the player is connected shall have in writing expressly authorized such negotiations prior to their commencement.

"6. That in the case of Major League players, the Commissioner of Baseball and in the case of Minor League players, the President of the National Association, may determine that the best interests of the game require a player to be declared ineligible and, after such declaration, no club shall be permitted to employ him unless he shall have been reinstated from the ineligible list.

"7. That an ineligible player whose name is omitted from a reserve list shall not thereby be rendered eligible for service unless and until he has applied for and been granted reinstatement.

"8. That any player who violates his contract or reservation, or who participates in a game with or against a club containing or controlled by ineligible players or a player under indictment for conduct detrimental to the good repute of professional baseball, shall be considered an ineligible player and placed on the ineligible list.

"9. That an ineligible player must be reinstated before he may be released from his contract.

"10. That clubs shall not tender contracts to ineligible players until they are reinstated.

"11. That no club may release unconditionally an ineligible player unless such player is first reinstated from the ineligible list to the active list.

. . . . .

"XIII.

"That by reason of Plaintiff being placed and held on said ineligible list as hereinabove set out and the making of the aforementioned contract by the Defendants, the Defendant[s], and each of them, have

plaintiffs allege that because of illegal and inequitable agreements of interstate scope between organized baseball and the Mexican League binding each to respect the other's "reserve clauses" they have lost the services of and contract rights to certain baseball players. The plaintiffs also allege that the defendants have entered into a combination, conspiracy and monopoly or an attempt to monopolize professional baseball in the United States to the substantial damage of the plaintiffs.

Conceding the major asset which baseball is to our Nation, the high place it enjoys in the hearts of our people and the possible justification of special treatment for organized sports which are engaged in interstate trade or commerce, the authorization of such treatment is a matter within the discretion of Congress.[11] Congress, however, has enacted no express exemption of organized baseball from the Sherman Act, and no court has demonstrated the existence of an implied exemption from that Act of any sport that is so highly organized as to amount to an interstate monopoly or which restrains interstate trade or commerce. In the absence of such an exemption, the present

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refused since the 25th day of May, 1950, and still do refuse to allow Plaintiff to play professional baseball, and that Plaintiff has thereby been deprived of his means of livelihood, all to the Plaintiff's damages in the sum of $125,000.00."

The complaint also contains a separate cause of action alleging that the defendants, by virtue of their agreements, have entered into a combination and conspiracy in the restraint of trade or commerce among the several states, and another cause of action alleging that the defendants have, by their agreements, combined to monopolize professional baseball in the United States.

[11] *E. g.*, Congress has expressly exempted certain specific activities from the Sherman Act, as in § 6 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 17 (labor organizations), in the Capper-Volstead Act, 42 Stat. 388-389, 7 U. S. C. §§ 291, 292 (farm cooperatives), and in the McCarran-Ferguson Act, 59 Stat. 34, 61 Stat. 448, 15 U. S. C. (Supp. V) § 1013 (insurance). And see *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 501, 512.

popularity of organized baseball increases, rather than diminishes, the importance of its compliance with standards of reasonableness comparable with those now required by law of interstate trade or commerce. It is interstate trade or commerce and, as such, it is subject to the Sherman Act until exempted. Accordingly, I would reverse the judgments in the instant cases and remand the causes to the respective District Courts for a consideration of the merits of the alleged violations of the Sherman Act.

AVONDALE MARINE WAYS, INC. v. HENDERSON, DEPUTY COMMISSIONER, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 44. Argued October 20, 1953.—Decided November 9, 1953.

The judgment in this case is affirmed on the authority of the cases cited.

201 F. 2d 437, affirmed.

Frank A. Bull argued the cause for petitioner. With him on the brief were *Ashton Phelps, John W. Sims* and *Daniel Huttenbrauck.*

Melvin Richter argued the cause for the Deputy Commissioner, respondent. With him on the brief were *Acting Solicitor General Stern, Assistant Attorney General Burger* and *Paul A. Sweeney.*

PER CURIAM.

The judgment is affirmed. *Davis* v. *Department of Labor,* 317 U. S. 249; *Kaiser Co.* v. *Baskin,* 340 U. S. 886; *Baskin* v. *Industrial Accident Commission,* 338 U. S. 854; *Bethlehem Steel Co.* v. *Moores,* 335 U. S. 874.

MR. JUSTICE REED took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS, concurring.

I do not think this case belongs in the "twilight zone" of *Davis* v. *Department of Labor,* 317 U. S. 249, 256. Recovery was allowed under the Longshoremen's and Harbor Workers' Compensation Act for a death which occurred on a barge drawn up for repairs on a marine railway. *Norton* v. *Vesta Coal Co.,* 63 F. 2d 165, was such

a case and Judge Woolley dissented from a holding that a marine railway was not included in the statutory language, "any dry dock."

As Judge Woolley explained, there are three kinds of dry docks. (1) A floating dry dock, as its name makes clear, floats on the water, the vessel resting on the bottom of the dry dock after the water has been removed. (2) A graven dry dock is dug into the land. The vessel floats in but rests on land once the water has been pumped out. (3) Finally there is the marine railway, on which the vessel is drawn out of the water, instead of the water being drawn away from the vessel. A ship is no more and no less on land when it rests in a graven dry dock than when it rests on a marine railway. The three types of dry docks are not different in kind; functionally they are the same. And I see no basis for concluding that Congress treated one differently from the others for the purposes of this Act.

MR. JUSTICE BURTON concurs in the affirmance of the judgment of the Court of Appeals but does so on the ground relied upon by that court and by the District Court. This was that the Deputy Commissioner, in making the award, acted within the terms of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1426, 33 U. S. C. § 903 (a), in that the decedent, at the time of receiving his fatal injury, was engaged in cleaning a tank of a barge located on the ways of a marine railway, by means of which the barge had been hauled out of the Mississippi River for repairs. They held that his death resulted "from an injury occurring upon the navigable waters of the United States (including any dry dock)" as those terms are used in such Act. *Avondale Marine Ways* v. *Henderson*, 201 F. 2d 437, following *Maryland Casualty Co.* v. *Lawson*, 101 F. 2d 732, and *Continental Casualty Co.* v. *Lawson*, 64 F. 2d 802.

ARKANSAS *v.* TEXAS ET AL.

ON MOTION FOR LEAVE TO FILE A COMPLAINT.

No. —, Original. Argued October 21, 1953.—Decided November 16, 1953.

Invoking the original jurisdiction of this Court under Art. III, § 2, of the Constitution, Arkansas filed a motion for leave to file a complaint against Texas. The complaint alleged that the University of Arkansas entered into a contract with a Texas charitable corporation whereby the corporation agreed to contribute money to the construction of a floor in a new hospital in the Arkansas State Medical Center; that, though the corporation is willing to perform, Texas has filed suit in the Texas courts to enjoin it on the ground that under Texas law its funds must be expended for the benefit of residents of Texas; and that the University has let contracts for the construction of the hospital, now partially completed, but is without funds to proceed further unless Texas is enjoined from interfering. *Held:*

1. The corporation is not an indispensable party to the suit. Pp. 369–370.

2. The controversy is between two States, since the State of Arkansas is the real party in interest in the contract with the Texas corporation and the complaint alleges that Texas is unlawfully interfering with its performance. Pp. 370–371.

3. The question whether the corporation has authority to expend its funds in furtherance of the Arkansas project is a question of Texas law. Hence the present motion is continued, without any expression of opinion on the merits, until the litigation in the Texas courts has been concluded. P. 371.

Thomas J. Gentry, Attorney General of Arkansas, and *E. J. Ball,* Special Assistant to the Attorney General, argued the cause for complainant. With them on the brief was *Kay Matthews,* Assistant to the Attorney General.

William H. Holloway and *Marietta McGregor Creel,* Assistant Attorneys General of Texas, argued the cause for defendants. With them on the brief was *John Ben Shepperd,* Attorney General.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This is a motion by Arkansas to file a complaint against Texas and invoke our original jurisdiction granted by Art. III, § 2, of the Constitution.

The complaint alleges that the University of Arkansas, acting through its Board of Trustees, and the William Buchanan Foundation, a corporation organized under the laws of Texas, entered into a contract whereby the Foundation agreed to contribute a sum of $500,000 to the construction of a one-hundred-bed pediatric floor in a new hospital in the Arkansas State Medical Center. The allegations are that, though the University of Arkansas and the Foundation are ready, willing, and able to perform, the State of Texas, acting through her Attorney General, has filed suit in the Texas courts to enjoin the Foundation from performing the contract on the ground that under Texas law the trust funds of the Foundation must be expended for the benefit of Texas residents. The complaint further alleges that the University of Arkansas is an official instrumentality of Arkansas, that in reliance on the agreement with the Foundation it let contracts for the construction of the hospital, proceeded with construction to the sixth floor, and is without funds to proceed further unless Texas is enjoined from interference with the contract.

We issued a rule to show cause why leave to file the complaint should not be granted, 345 U. S. 954. Texas has made return to the rule and the case has been argued.

Texas first argues that the William Buchanan Foundation is an indispensable party to the suit. We do not agree. The theory of the complaint is that Texas is interfering without legal justification with Arkansas' contract with a third person. At least since *Lumley* v. *Gye*, 2 El. & Bl. 216, 118 Eng. Rep. 749 (Q. B. 1853), a cause of action based on that tortious conduct has been recognized. See *Angle* v. *Chicago, St. P., M. & O. R. Co.*, 151 U. S. 1, 13–15; *Bitterman* v. *Louisville & N. R. Co.*, 207 U. S. 205,

222–223. However appropriate it might be to join the Foundation as a defendant in the case (see *Texas* v. *Florida*, 306 U. S. 398, 405), the controversy is between Arkansas and Texas—the issue being whether Texas is interfering unlawfully with Arkansas' contract.

The contention that the controversy is between two States is challenged on the ground that the injured party is the University of Arkansas, which does not stand in the shoes of the State. Arkansas must, of course, represent an interest of her own and not merely that of her citizens or corporations. *Oklahoma* v. *Cook*, 304 U. S. 387. But as we read Arkansas law the University of Arkansas is an official state instrumentality; and we conclude that for purposes of our original jurisdiction any injury under the contract to the University is an injury to Arkansas.

The University, which was created by the Arkansas legislature,[1] is governed by a Board of Trustees appointed by the Governor with consent of the Senate.[2] The Board, to be sure, is "a body politic and corporate" [3] with power to issue bonds which do not pledge the credit of the State.[4] But the Board must report all of its expenditures to the legislature,[5] and the State owns all the property used by the University.[6] The Board of Trustees is denominated "a public agency" of the State,[7] the University is referred to as "an instrument of the state in the performance of a governmental work," [8] and a suit against the University is a suit against the State.[9]

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[1] See Ark. Acts 1871, No. 44; Ark. Stat., 1947, § 80-2801, Compiler's Notes.

[2] Ark. Stat., 1947, § 80-2802.

[3] Ark. Stat., 1947, § 80-2804.

[4] *Jacobs* v. *Sharp*, 211 Ark. 865, 202 S. W. 2d 964.

[5] Ark. Stat., 1947, § 80-2817.

[6] *Id.*, §§ 80-2849 ff.; 80-2905; 80-3311.

[7] *Jacobs* v. *Sharp*, 211 Ark., at 866, 202 S. W. 2d 964.

[8] *Vincenheller* v. *Reagan*, 69 Ark. 460, 474, 64 S. W. 278, 284. And see *Gipson* v. *Ingram*, 215 Ark. 812, 223 S. W. 2d 595.

[9] See *Allen Engineering Co.* v. *Kays*, 106 Ark. 174, 152 S. W. 992.

In determining whether the interest being litigated is an appropriate one for the exercise of our original jurisdiction, we of course look behind and beyond the legal form in which the claim of the State is pressed. We determine whether in substance the claim is that of the State, whether the State is indeed the real party in interest. *Oklahoma* v. *Cook, supra,* pp. 392–396. Arkansas is in our view the real party in interest. The University of Arkansas is her agency in the educational field—a branch or department of the State.

The central question which the case tenders is whether the William Buchanan Foundation has authority to spend its funds for furtherance of this Arkansas project. That is necessarily a question of Texas law, for the Foundation gets its existence and its powers from Texas. Texas courts speak with authority on those issues. Were we to undertake to resolve the questions, we might find ourselves in conflict with the courts that have the final say. Moreover litigation is now pending in the Texas courts which will authoritatively determine what the Texas law is. We therefore follow the course we have taken in analogous situations (cf. *Thompson* v. *Magnolia Co.,* 309 U. S. 478, 483; *Herb* v. *Pitcairn,* 324 U. S. 117) and continue the present motion until the litigation in the Texas courts has been concluded. If that litigation resolves the whole controversy, leaving no federal questions, there will be no occasion for us to proceed further.

It is so ordered.

MR. JUSTICE JACKSON, whom MR. JUSTICE FRANKFURTER, MR. JUSTICE CLARK and MR. JUSTICE MINTON join, dissenting.

We would deny this motion outright, because we think no case is presented appropriate for original action here.

In 1923, William Buchanan, a citizen and resident of Texas, executed within that State a conveyance of personal property to trustees. They, in Texas, duly ac-

cepted the trust. The trust instrument recited the purpose to create and endow an incorporated charitable enterprise known as "The William Buchanan Foundation" in the City of Texarkana, Texas. Such a corporation was created by the State of Texas for the particular purpose of carrying out the provisions of the trust deed made by Buchanan.

It is needless to recite these purposes beyond saying that they are broadly stated, and some clauses leave the broadest discretion to the Foundation. Another clause contemplates that the trust "shall be administered in Bowie County, Texas, but for the benefit not only of the citizens or residents of said county, but also for the benefit of the citizens or residents of adjoining counties, as well as for the benefit of such other persons as in the judgment of the Trustees should receive the benefits of the activities or institutions established hereunder." That this instrument is open in good faith to different interpretations seems apparent.

The trustees have made an agreement to expend a large sum for a charity hospital at the University of Arkansas, a state institution. The validity of that contract is questioned in the courts of Texas by the Attorney General thereof, whose duties include some supervision of the administration of charitable trusts.

If under these circumstances the courts of Texas cannot finally decide the validity and interpretation of its own charter and trust instrument and its corporation's power to contract, then there is little left of the original conception of state power. This Court seems to agree that some vestige, at least, of such power remains.

If a controversy between two states concerns the construction of a compact, *Dyer* v. *Sims*, 341 U. S. 22, or presents "a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive," *Hinderlider* v. *La Plata Co.*, 304 U. S. 92,

110, this Court must, of course, determine their rights *inter sese*.

Local questions may be intertwined with these ultimate federal rights, and if there are sufficient grounds for delaying final action we may wait in order to "have the advantage of the views of the state court." See *Kentucky* v. *Indiana*, 281 U. S. 163, 177.

But where, as here, we are concerned with a question of Texas law in which the courts of that State necessarily "have the final say" the only basis for our holding the suit is to ride herd on the Texas court, on the assumption that it may deny Arkansas some federal right. We ought not to entertain such a possibility in the administration of justice of one state against a sister state. Of course Arkansas will get justice in Texas, just as Texas would get justice in Arkansas.

If Texas courts decide that the contract is valid, Arkansas has no grievance. If Texas decides the other way, what more does this Court plan to do? What is the meaning of holding this case on the docket? We think the Texas courts should be left to decide their state law questions without the threat implicit in keeping this case alive. Exertion of a state's power to determine whether a contract of its corporation is *ultra vires* cannot be made a tortious interference with the rights of any party to the contract. Since we think the contention is frivolous, we would deny the motion and have done with the business.

UNITED STATES *v.* DEBROW.

NO. 51. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.*

Argued October 20, 1953.—Decided November 16, 1953.

The indictments of respondents under 18 U. S. C. § 1621 for perjury in wilfully testifying falsely to material facts, after each had "duly taken an oath," before a Senatorial subcommittee duly created and duly authorized to administer oaths, complied with Rule 7 (c) of the Federal Rules of Criminal Procedure; and they should not have been dismissed for failure to allege the name of the person who administered the oaths or his authority to do so. Pp. 375–378.

(a) The name of the person who administered the oath is not an essential element of the crime of perjury. Pp. 376–377.

(b) R. S. § 5396, which required that an indictment for perjury aver the name and authority of the person who administered the oath, was repealed by the Act of June 25, 1948, 62 Stat. 862, revising the Criminal Code. P. 377.

203 F. 2d 699, reversed.

The District Court dismissed indictments of the respondents for perjury. The Court of Appeals affirmed. 203 F. 2d 699. This Court granted certiorari. 345 U. S. 991. *Reversed*, p. 378.

John F. Davis argued the cause for the United States. With him on the brief were *Acting Solicitor General Stern, Assistant Attorney General Olney, Beatrice Rosenberg* and *Felicia H. Dubrovsky.*

Ben F. Cameron argued the cause for respondents. With him on the brief were *W. S. Henley, R. W. Thompson, Jr., Albert Sidney Johnston, Jr., W. W. Dent* and *T. J. Wills.*

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*Together with No. 52, *United States* v. *Wilkinson;* No. 53, *United States* v. *Brashier;* No. 54, *United States* v. *Rogers;* and No. 55, *United States* v. *Jackson*, all on certiorari to the same court.

MR. JUSTICE MINTON delivered the opinion of the Court.

The respondents here, defendants below, were charged by separate indictments with the crime of perjury, as defined in 18 U. S. C. § 1621.[1] Each indictment read in material part as follows:

> "[T]he defendant herein, having duly taken an oath before a competent tribunal, to wit: a subcommittee of the Senate Committee on Expenditures in the Executive Departments known as the Subcommittee on Investigations, a duly created and authorized subcommittee of the United States Senate conducting official hearings in the Southern District of Mississippi, and inquiring in a matter then and there pending before the said subcommittee in which a law of the United States authorizes that an oath be administered, that he would testify truly, did unlawfully, knowingly and wilfully, and contrary to said oath, state a material matter which he did not believe to be true . . . ."

The defendants filed motions to dismiss, which were sustained on the ground that the indictments did not allege the name of the person who administered the oath nor his authority to do so.[2] The Court of Appeals

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[1] "Perjury generally.

"Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both."

[2] *United States* v. *Debrow et al.*, U. S. D. C. S. D. Miss., Feb. 11, 1952 (unreported).

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affirmed, one judge dissenting, 203 F. 2d 699, and we granted certiorari, 345 U. S. 991, because of the importance of the question in the administration of federal criminal law.

An indictment is required to set forth the elements of the offense sought to be charged.

> "The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, 'and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offence, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.' *Cochran and Sayre* v. *United States*, 157 U. S. 286, 290; *Rosen* v. *United States*, 161 U. S. 29, 34." *Hagner* v. *United States*, 285 U. S. 427, 431.

The Federal Rules of Criminal Procedure were designed to eliminate technicalities in criminal pleading and are to be construed to secure simplicity in procedure. Rule 2, F. R. Crim. Proc. Rule 7 (c) provides in pertinent part as follows:

> "The indictment . . . shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. . . . It need not contain . . . any other matter not necessary to such statement. . . ."

The essential elements of the crime of perjury as defined in 18 U. S. C. § 1621 are (1) an oath authorized by a law of the United States, (2) taken before a competent tribunal, officer or person, and (3) a false statement wilfully made as to facts material to the hearing. The indictments allege that the subcommittee of the Senate was a competent tribunal, pursuing matters properly

before it, that in such proceeding it was authorized by a law of the United States to administer oaths, and that each defendant duly took an oath before such competent tribunal and wilfully testified falsely as to material facts.

The oath administered must be authorized by a law of the United States. This requirement is met by the allegations in the indictments that the defendants had "duly taken an oath." "Duly taken" means an oath taken according to a law which authorizes such oath. See *Robertson* v. *Perkins*, 129 U. S. 233, 236. The name of the person who administered the oath is not an essential element of the crime of perjury; the identity of such person goes only to the proof of whether the defendants were duly sworn. Therefore, all the essential elements of the offense of perjury were alleged.

The source of the requirement that an indictment for perjury must aver the name and authority of the person who administered the oath is to be found in R. S. § 5396, 18 U. S. C. (1940 ed.) § 558. It may be worthy of note that this provision was expressly repealed by Congress in 1948, 62 Stat. 862, in the revision and recodification of Title 18. The House Committee on Revision of the Laws had the assistance of two special consultants who were members of the Advisory Committee on the Federal Rules of Criminal Procedure and who "rendered invaluable service in the technical task of singling out for repeal or revision the statutory provisions made obsolete by the new Federal Rules of Criminal Procedure." H. R. Rep. No. 304, 80th Cong., 1st Sess., p. 4. In the tabulation of laws omitted and repealed by the revision, it is stated that R. S. § 5396 was repealed because "Covered by rule 7 of the Federal Rules of Criminal Procedure." *Id.*, at A214.

The charges of the indictments followed substantially the wording of the statute, which embodies all the elements of the crime, and such charges clearly informed the

defendants of that with which they were accused, so as to enable them to prepare their defense and to plead the judgment in bar of any further prosecutions for the same offense. It is inconceivable to us how the defendants could possibly be misled as to the offense with which they stood charged. The sufficiency of the indictment is not a question of whether it could have been more definite and certain. If the defendants wanted more definite information as to the name of the person who administered the oath to them, they could have obtained it by requesting a bill of particulars. Rule 7 (f), F. R. Crim. Proc.

The indictments were sufficient, and the dismissal thereof was error. The judgments are

Reversed.

MR. JUSTICE REED took no part in the consideration or decision of these cases.

BANKERS LIFE & CASUALTY CO. *v.* HOLLAND, CHIEF JUDGE, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 16. Argued October 12–13, 1953.—Decided November 30, 1953.

In the circumstances of this case, mandamus against a federal district judge was not an appropriate remedy to vacate a severance and transfer order entered by him under 28 U. S. C. § 1406 (a) on the ground of improper venue. Pp. 379–385.

(a) The supplementary review power conferred on federal courts by the All Writs Act is meant to be used only in exceptional cases where there is a clear abuse of discretion or usurpation of judicial power; and this is not such a case. Pp. 382–383.

(b) Use of the writ of mandamus was not appropriate in this case to prevent alleged inconvenience and hardship occasioned by an appeal being delayed until after final judgment. Pp. 383–384.

(c) Petitioner has not met the burden of showing that its right to issuance of the writ is "clear and indisputable." P. 384.

199 F. 2d 593, affirmed.

Charles F. Short, Jr. argued the cause for petitioner. With him on the brief was *Miller Walton.*

M. H. Blackshear, Jr. argued the cause for respondents. With him on the brief were *Eugene Cook*, Attorney General of Georgia, and *Lamar W. Sizemore*, Assistant Attorney General.

MR. JUSTICE CLARK delivered the opinion of the Court.

The question here is whether mandamus is an appropriate remedy to vacate a severance and transfer order entered by a district judge on the ground of improper venue, under 28 U. S. C. § 1406 (a).[1]

[1] "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."

This case arises out of a treble damage action brought by petitioner, an Illinois insurance corporation, in the United States District Court for the Southern District of Florida, alleging a conspiracy to injure petitioner's business, in violation of the Sherman and Clayton Acts. The complaint named as defendants the insurance commissioners of Georgia and Florida, one other individual, and four insurance companies residing and transacting business in the Southern District of Florida. The Georgia insurance commissioner, Cravey, was personally served in the Northern District of Florida and, without entering his appearance or waiving venue, moved to quash the summons and return of service and dismiss him from the action for improper venue.

The applicable venue statute for private treble damage actions brought under the antitrust laws, 15 U. S. C. § 15, allows suit "in any district court of the United States in the district in which the defendant resides or is found or has an agent . . . ." It is admitted that Commissioner Cravey was not a resident of the Southern District of Florida, but petitioner contends that the Commissioner "was a member of a conspiracy whose other members were residing and carrying on the illegal business of the conspiracy in the Southern District of Florida, . . . that a conspiracy is a partnership and that co-conspirators are each other's agents . . ." and that the Commissioner therefore was "found" and had "agents" in the district, within the meaning of the statute. In furtherance of its theory that the Commissioner was "found" in the district, petitioner alleged overt acts committed by the Commissioner, as well as his codefendants, in the district where the suit was filed. The respondent judge held that the court had jurisdiction of the action and of the Commissioner, under Rule 4 (f) of the Rules of Civil Procedure, service of process having been had on him in the Northern District of Florida. The judge held, however, that venue was

not properly laid and, pursuant to 28 U. S. C. § 1406 (a), ordered the action as to Cravey severed and transferred to the Northern District of Georgia where Cravey resided. Petitioner then sought a writ of mandamus from the Court of Appeals to compel the respondent to vacate and set aside the order of severance and transfer. The Court of Appeals dismissed the petition for mandamus on the ground that it was not an appropriate remedy. 199 F. 2d 593. Because of the importance of the question in the effective administration of federal law we granted certiorari. 345 U. S. 933.

At the outset it appears to be agreed that the District Court had jurisdiction over Commissioner Cravey under the process served on him in the Northern District of Florida.[2] However, petitioner contends that the respondent judge had "power" to order the severance and transfer *only* if venue was improperly laid and that when venue is proper that "power" does not exist. Petitioner insists that venue was proper on the theory aforesaid that the Commissioner was "found" or had "agents" in the district; that the severance and transfer order was therefore void but being interlocutory no appeal would lie; and that the only effective remedy is mandamus. While it admits that the order eventually may be reviewed on appeal from final judgment in the case, petitioner contends that insurmountable procedural difficulties requiring appeals from, and reversals of, the final judgments in both the Florida action and the severed action in Georgia render that remedy speculative, ineffective and

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[2] Rule 4 (f) of Rules of Civil Procedure:

"Territorial Limits of Effective Service. All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held and, when a statute of the United States so provides, beyond the territorial limits of that state. A subpoena may be served within the territorial limits provided in Rule 45."

inadequate in preventing needless expense, hardship and judicial inconvenience. Wherefore, it says, the extraordinary writ of mandamus is appropriate.

We are of the opinion that in the circumstances of this case the writ was inappropriate.

The All Writs Act grants to the federal courts the power to issue "all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U. S. C. § 1651 (a). As was pointed out in *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, 26 (1943), the "traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." Here, however, petitioner admits that the court had jurisdiction both of the subject matter of the suit and of the person of Commissioner Cravey and that it was necessary in the due course of the litigation for the respondent judge to rule on the motion. The contention is that in acting on the motion and ordering transfer he exceeded his legal powers and this error ousted him of jurisdiction. But jurisdiction need not run the gauntlet of reversible errors. The ruling on a question of law decisive of the issue presented by Cravey's motion and the replication of the petitioner was made in the course of the exercise of the court's jurisdiction to decide issues properly brought before it. *Ex parte American Steel Barrel Co.*, 230 U. S. 35, 45–46 (1913); *Ex parte Roe*, 234 U. S. 70, 73 (1914). Its decision against petitioner, even if erroneous—which we do not pass upon—involved no abuse of judicial power, *Roche* v. *Evaporated Milk Assn.*, *supra*, and is reviewable upon appeal after final judgment.[3] If we applied the reasoning advanced by

[3] See *Gulf Research & Development Co.* v. *Leahy*, 193 F. 2d 302 (1951).

the petitioner, then every interlocutory order which is wrong might be reviewed under the All Writs Act. The office of a writ of mandamus would be enlarged to actually control the decision of the trial court rather than used in its traditional function of confining a court to its prescribed jurisdiction. In strictly circumscribing piecemeal appeal,[4] Congress must have realized that in the course of judicial decision some interlocutory orders might be erroneous. The supplementary review power conferred on the courts by Congress in the All Writs Act is meant to be used only in the exceptional case where there is clear abuse of discretion or "usurpation of judicial power" of the sort held to justify the writ in *De Beers Consolidated Mines* v. *United States*, 325 U. S. 212, 217 (1945). This is not such a case.

It is urged, however, that the use of the writ of mandamus is appropriate here to prevent "judicial inconvenience and hardship" occasioned by appeal being delayed until after final judgment. But it is established that the extraordinary writs cannot be used as substitutes for appeals, *Ex parte Fahey*, 332 U. S. 258, 259–260 (1947), even though hardship may result from delay and perhaps unnecessary trial, *United States Alkali Export Assn.* v. *United States*, 325 U. S. 196, 202–203 (1945); *Roche* v. *Evaporated Milk Assn.*, *supra*, at 31; and whatever may be done without the writ may not be done with it. *Ex parte Rowland*, 104 U. S. 604, 617 (1882). We may assume that, as petitioner contends, the order of transfer defeats the objective of trying related issues in a single action and will give rise to a myriad of legal and practical problems as well as inconvenience to both courts; but Congress must have contemplated those conditions in providing that only final judgments are reviewable. Petitioner has alleged no special circumstances such as were

[4] 28 U. S. C. §§ 1291, 1292.

present in the cases which it cites.[5] Furthermore, whatever "judicial inconvenience and hardship" may exist here will remain, after transfer, within the realm of the same court of appeals which has denied the writ, since both of the districts are within that circuit; and it is not clear that adequate remedy cannot be afforded petitioner in due course by that court to prevent some of the conflicts and procedural problems anticipated.

We note additionally that the petitioner has not met the burden of showing that its right to issuance of the writ is "clear and indisputable." *United States* v. *Duell*, 172 U. S. 576, 582 (1899). While a criminal action under the antitrust laws lies in any district where the conspiracy was formed or in part carried on or where an overt act was committed in furtherance thereof,[6] Congress by 15 U. S. C. § 15 placed definite limits on venue in treble damage actions. Certainly Congress realized in so doing that many such cases would not lie in one district as to all defendants, unless venue was waived. It must, therefore, have contemplated that such proceedings might be severed and transferred or filed in separate districts originally. Thus petitioner's theory has all the earmarks of a frivolous albeit ingenious attempt to expand the statute.

We adhere to the language of this Court in *Ex parte Fahey, supra*, at 259–260:

> "Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. We do not doubt power in a proper case to issue such writs. But they have the unfortunate consequence

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[5] *Ex parte Simons*, 247 U. S. 231 (1918); *United States Alkali Export Assn.* v. *United States, supra*; *De Beers Consolidated Mines* v. *United States, supra*. See also *Ex parte United States*, 287 U. S. 241 (1932); *Maryland* v. *Soper*, 270 U. S. 9 (1926).

[6] *United States* v. *Trenton Potteries Co.*, 273 U. S. 392, 402–403 (1927); *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 252–253 (1940).

of making the judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants before him. These remedies should be resorted to only where appeal is a clearly inadequate remedy. . . . As extraordinary remedies, they are reserved for really extraordinary causes."

Affirmed.

MR. JUSTICE DOUGLAS concurs in the result.

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE JACKSON and MR. JUSTICE MINTON join, dissenting.

This case presents one of those clear situations where due regard for the canons governing the exercise of the Court's certiorari jurisdiction calls for dismissal of the writ as improvidently granted.

1. Whatever view one may take of the scope of the venue requirement of § 4 of the Clayton Act, 15 U. S. C. § 15, it cannot be doubted that that section precludes the Georgia Commissioner of Insurance from being made a defendant in this suit unless he "resides or is found or has an agent" in the Southern District of Florida, or has consented, by formal appearance or by some other form of waiver, to be sued there.

He has neither consented nor made such a waiver. On the contrary, he has stood on the right Congress gave him and has resisted his amenability to suit in the Southern District of Florida.

2. The only basis, on the record before us, for the claim that § 4 subjected the Georgia Commissioner to suit is the suggestion that since the complaint charges a conspiracy between him and co-conspirators who reside in the Southern District of Florida, the latter thereby became his "agents" within the meaning of § 4 of the Clayton Act. The Court now characterizes this contention as "frivolous." Presumably that is why this issue was

not brought here and the grant of the writ was restricted to question 1.[1] 345 U. S. 933.

3. If we now had to decide whether a co-conspirator as such is an "agent" for purposes of venue under 15 U. S. C. § 15, it cannot be doubted that we would have to conclude that the district judge was right in finding that the Georgia Commissioner could not be kept in the suit. Once it is clear that the Georgia defendant has the right to be let out, all discussion of the limits of mandamus becomes irrelevant and gratuitous. Obviously a judge cannot be mandamused to put a proposed defendant into a litigation when as a matter of unquestioned law he should be let out.

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[1] The questions the petition for certiorari presented were as follows:

"1. Is mandamus an appropriate remedy to vacate the order of severance and transfer as an unwarranted renunciation of jurisdiction which would compel needless duplicity of trials and appeals to enforce the right to a single trial against all defendants in a proper forum?

"2. Where venue is properly laid in a district in which a non-resident conspirator is 'found' and has agents within the meaning of 15 U. S. C. § 15, is mandamus appropriate to vacate the order of severance and transfer as being in excess of the power of transfer conferred by 28 U. S. C. § 1406 (a)?

"3. Is a non-resident conspirator 'found' for venue purposes within the meaning of 15 U. S. C. § 15 when, although served with process in another district in the same state, venue is laid in a district where he has, in person when physically present and at other times through the agency of his resident co-conspirators, engaged in the business of the conspiracy in violation of the antitrust laws to the substantial injury of plaintiff's business?

"4. Are the resident co-conspirators of a non-resident conspirator his agents for venue purposes within the meaning of 15 U. S. C. § 15 when venue is laid in a district where he has, through the agency of his resident co-conspirators, engaged in the business of the conspiracy in violation of the antitrust laws to the substantial injury of plaintiff's business?"

4. Since the mandamus question would not have been brought here had the volume of business that confronts the Court permitted the record to be examined in passing on the petition for certiorari as it now has been, we should not feel ourselves bound to discuss that question after we have had the kind of careful consideration that is given a case after argument.[2]

5. It is a too easy view that now that the case is here we might as well dispose of it on the assumption on which it was brought here. The short but important answer is that which was made by Mr. Chief Justice Taft on behalf of the whole Court in *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U. S. 387, 393.

> "If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal. The present case certainly comes under neither head." [3]

The case before us is more compelling for dismissal, since the question on which we granted certiorari does not here arise.

6. Discussion of mandamus in this case is not even useful as *dicta* for future guidance on an important issue.

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[2] It should be noted that during the last Term the Court disposed of 1,286 cases.

[3] The case of *Hammerstein* v. *Superior Court*, 341 U. S. 491, is a very recent instance of where the Court after argument took a more careful look at a grant of certiorari and dismissed the writ as improvidently granted.

The Court's opinion does not help decision when a party is dismissed from a litigation for reasons not as obviously compelling as those in this case. It necessarily leaves open the question whether such a ruling by a district judge may be reviewed by mandamus, without awaiting the completion of the entire litigation, in circumstances where postponement of review would involve a protracted trial, entailing heavy costs and great inconvenience. Compare *Ex parte Skinner & Eddy Corp.*, 265 U. S. 86, 95–96, with *Ex parte Chicago, R. I. & P. R. Co.*, 255 U. S. 273. This Court ought not to be called upon to hold that where a district judge refused to entertain a "frivolous" claim, mandamus will not issue to compel him to entertain it. But that is the only holding of the Court's decision today.

DICKINSON *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 57. Argued October 21, 1953.—Decided November 30, 1953.

There was no basis in fact for denying petitioner's claim to ministerial exemption under § 6 (g) of the Universal Military Training and Service Act, and his conviction for refusing to submit to his local board's induction order is reversed. Pp. 390–397.

(a) The provision of the Act that classification orders by selective service authorities shall be "final" does not preclude judicial inquiry into the question of jurisdiction where there is no basis in fact for the classification order. P. 394.

(b) The ministerial exemption being a matter of legislative grace, the registrant bears the burden of clearly establishing a right to the exemption. Pp. 394–395.

(c) Petitioner made out a prima facie case within the statutory exemption by uncontroverted evidence that he was ordained in accordance with the ritual of his sect (Jehovah's Witnesses) and that he was regularly engaged, as a vocation, in teaching and preaching the principles of his sect and conducting public worship in the tradition of his religion. P. 395.

(d) That petitioner worked five hours a week as a radio repairman did not supply a factual basis for denial of the ministerial exemption to which he was otherwise entitled. Pp. 395–396.

(e) There is no affirmative evidence in the record in this case to support the local board's overt or implicit finding that petitioner had not painted a complete or accurate picture of his activities. P. 396.

(f) When the uncontroverted evidence supporting a registrant's claim places him prima facie within the statutory exemption, the claim may not be dismissed solely on the basis of suspicion and speculation. Pp. 396–397.

203 F. 2d 336, reversed.

Hayden C. Covington argued the cause and filed a brief for petitioner.

Robert W. Ginnane argued the cause for the United States. With him on the brief were *Acting Solicitor General Stern, Assistant Attorney General Olney, Beatrice Rosenberg* and *J. F. Bishop.*

MR. JUSTICE CLARK delivered the opinion of the Court.

The principal and decisive issue before us is whether there was a basis in fact for denying Dickinson's claim to a ministerial exemption under § 6 (g) of the Universal Military Training and Service Act, 62 Stat. 611, 50 U. S. C. App. § 456 (g).[1] After the selective service authorities denied his claim, Dickinson refused to submit to induction in defiance of his local board's induction order. For this refusal he was convicted, in the United States District Court for the Northern District of California,[2] of violating § 12 (a)[3] of the Act. The Court of Appeals for the Ninth Circuit affirmed the conviction. 203 F. 2d 336. We granted certiorari. 345 U. S. 991.

Section 6 (g) is the source of the ministerial exemption. It provides, in pertinent part, that "Regular or duly ordained ministers of religion, as defined in this title, . . . shall be exempt from training and service (but not from registration) under this title." Section

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[1] The title was changed from the "Selective Service Act of 1948" to the "Universal Military Training and Service Act" by 65 Stat. 75.

[2] Petitioner waived trial by jury in accordance with Rule 23 of the Rules of Criminal Procedure.

[3] "[A]ny . . . person . . . who . . . refuses . . . service in the armed forces . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment . . . ."

Dickinson was sentenced to two years' imprisonment.

16 (g) embodies Congress' definition of a "regular or duly ordained minister of religion."

"(1) The term 'duly ordained minister of religion' means a person who has been ordained, in accordance with the ceremonial, ritual, or discipline of a church, religious sect, or organization established on the basis of a community of faith and belief, doctrines and practices of a religious character, to preach and to teach the doctrines of such church, sect, or organization and to administer the rites and ceremonies thereof in public worship, and who as his regular and customary vocation preaches and teaches the principles of religion and administers the ordinances of public worship as embodied in the creed or principles of such church, sect, or organization.

"(2) The term 'regular minister of religion' means one who as his customary vocation preaches and teaches the principles of religion of a church, a religious sect, or organization of which he is a member, without having been formally ordained as a minister of religion, and who is recognized by such church, sect, or organization as a regular minister.

"(3) The term 'regular or duly ordained minister of religion' does not include a person who irregularly or incidentally preaches and teaches the principles of religion of a church, religious sect, or organization and does not include any person who may have been duly ordained a minister in accordance with the ceremonial, rite, or discipline of a church, religious sect or organization, but who does not regularly, as a vocation, teach and preach the principles of religion and administer the ordinances of public worship as embodied in the creed or principles of his church, sect, or organization."

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Registrants who satisfy this definition are entitled to be classified IV–D. 32 C. F. R. § 1622.43.[4]

Dickinson, a Jehovah's Witness, originally claimed IV–D in 1948, shortly after he registered under the Act. At that time he stated, in his classification questionnaire, that he was a "regular" but not an ordained minister, and was working 40 hours a week as a radio repairman. From other documents submitted to the board it appeared that he devoted an uncertain number of hours a week leading two Bible study groups and "several hours each week" preaching to the public. On these facts he was classified I–A in July 1950. The validity of this classification is not at issue.

What is at issue is the decision of Dickinson's local board to continue him in I–A in September 1950 after he requested reclassification based on changed conditions in his vocation occurring subsequent to the filing of his questionnaire in 1948. Through his sworn testimony at a personal appearance before the board and subsequent letters to the selective service authorities, and through the affidavit of one C. David Easter, a "supervisor" for the Watchtower Bible and Tract Society in the San Francisco area, supplemented by three letters from the Society itself, Dickinson established the following uncontradicted facts.

In the Spring of 1949 Dickinson voluntarily left his 40-hour-a-week job as a radio repairman and was baptized, the mark of ordination to Jehovah's Witnesses. In August 1949 he was enrolled by national headquarters of the Watchtower Bible and Tract Society and began his work as a full-time "pioneer" minister, devoting 150 hours each month to religious efforts. This shift in Dickinson's activities occurred after February 1949

[4] Formerly this regulation was numbered § 1622.19, 32 C. F. R. § 1622.19 (1949).

when selection under the Act was at a standstill, regular inductions having been halted.[5] As of January 1950 Dickinson changed his residence in order to assume the role of "Company Servant" or presiding minister of the Coalinga, California, "Company," which encompassed a 5,400-square-mile area. At that time he dedicated approximately 100 hours each month to actual pioneer missionary work—delivering public sermons, door-to-door preaching, conducting home Bible studies. In the remaining 50 hours devoted to religious activities each month, Dickinson studied, planned sermons and discourses, and wrote letters connected with his work. A substantial portion of this time was spent conducting three to four meetings each week of the "Company" or congregation at a public hall in Coalinga. Dickinson arranged for and presided over these meetings, usually delivering discourses at them. He also instructed prospective ministers in the proper delivery of sermons at the "Company's" Theocratic Ministry School. Dickinson received no salary for his missionary or company servant work. He lived on $35 a month earned by a weekly average of five hours of radio repair work. This modest income, a low $15–17.50 a month rental for an apartment, self-performance of household tasks, and invitations to various private homes enabled Dickinson to subsist.

Despite this uncontroverted evidence of marked change in Dickinson's activities, the local board continued him in I–A. This ruling was affirmed by the state and national appeal boards, and he was ordered to report for induction on July 16, 1951. Dickinson reported to the

[5] Regular inductions resumed in August 1950. Annual Report of the Director of Selective Service 90 (1952). Since induction was not an immediate threat when Dickinson changed his activities, the change itself would hardly show bad faith, if that were an issue. However, bad faith is not at issue in cases such as this.

induction center but refused to submit to induction. His indictment and conviction followed.

At the outset it is important to underline an elemental feature of this case. The Universal Military Training and Service Act does not permit direct judicial review of selective service classification orders. Rather the Act provides, as did the 1917 and 1940 conscription Acts before it,[8] that classification orders by selective service authorities shall be "final." However, in *Estep* v. *United States*, 327 U. S. 114 (1946), a case arising under the 1940 Act, this Court said, at 122–123: "The provision making the decisions of the local boards 'final' means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant."

The ministerial exemption, as was pointed out in the Senate Report accompanying the 1948 Act, "is a narrow one, intended for the leaders of the various religious faiths and not for the members generally." S. Rep. No. 1268, 80th Cong., 2d Sess. 13. Certainly all members of a religious organization or sect are not entitled to the exemption by reason of their membership, even though in their belief each is a minister. Cf. *Cox* v. *United States*, 332 U. S. 442 (1947). On the other hand, a legitimate minister cannot be, for the purposes of the Act, unfrocked simply because all the members of his sect base an exemption claim on the dogma of its faith. That would

[8] 40 Stat. 80 (1917), 54 Stat. 893 (1940).

leave a congregation without a cleric. Each registrant must satisfy the Act's rigid criteria for the exemption. Preaching and teaching the principles of one's sect, if performed part-time or half-time, occasionally or irregularly, are insufficient to bring a registrant under § 6 (g). These activities must be regularly performed. They must, as the statute reads, comprise the registrant's "vocation." And since the ministerial exemption is a matter of legislative grace, the selective service registrant bears the burden of clearly establishing a right to the exemption.[7]

We think Dickinson made out a case which meets the statutory criteria. He was ordained in accordance with the ritual of his sect and, according to the evidence here, he meets the vital test of regularly, as a vocation, teaching and preaching the principles of his sect and conducting public worship in the tradition of his religion. That the ordination, doctrines, or manner of preaching that his sect employs diverge from the orthodox and traditional is no concern of ours; of course the statute does not purport to impose a test of orthodoxy.

Why, then, was Dickinson denied IV–D? It may be argued that his five hours a week as a radio repairman supplied a factual basis for the denial. We think not. The statutory definition of a "regular or duly ordained minister" does not preclude all secular employment. Many preachers, including those in the more traditional and orthodox sects, may not be blessed with congregations or parishes capable of paying them a living wage. A statutory ban on all secular work would mete out draft exemptions with an uneven hand, to the detriment of those who minister to the poor and thus need some secular work in order to survive. To hold that one who supports himself by five hours of secular work each week may

[7] See 32 C. F. R. § 1622.1 (c).

thereby lose an exemption to which he is otherwise entitled, would be to achieve a result that Congress so wisely avoided.

The court below in affirming the conviction apparently thought the local board was free to disbelieve Dickinson's testimonial and documentary evidence even in the absence of any impeaching or contradictory evidence. The court manifested its own skepticism by pointing to Dickinson's youth, the unorthodox method of ordination by baptism, the failure to present stronger documentary evidence from Watchtower Society leaders, and the customary claim of Jehovah's Witnesses to ministerial exemptions. However, Dickinson's claims were not disputed by any evidence presented to the selective service authorities, nor was any cited by the Court of Appeals. The task of the courts in cases such as this is to search the record for some affirmative evidence to support the local board's overt or implicit finding that a registrant has not painted a complete or accurate picture of his activities. We have found none here.

Local boards are not courts of law and are not bound by traditional rules of evidence; they are given great leeway in hearing and considering a variety of material as evidence.[8] If the facts are disputed the board bears the ultimate responsibility for resolving the conflict—the courts will not interfere. Nor will the courts apply a test of "substantial evidence." However, the courts may properly insist that there be some proof that is incompatible with the registrant's proof of exemption. The local board may question a registrant under oath, subpoena witnesses to testify, and require both registrant and witnesses to produce documents. 32 C. F. R. § 1621.15. The board is authorized to obtain information

[8] 32 C. F. R. § 1622.1 (c). See *Lehr* v. *United States*, 139 F. 2d 919, 922 (1944).

from local, state, and national welfare and governmental agencies. 32 C. F. R. § 1621.14. The registrant's admissions, testimony of other witnesses, frequently unsolicited evidence from a registrant's neighbors, or information obtained from other agencies may produce dissidence which the boards are free to resolve. Absent such admissions or other evidence, the local boards may call on the investigative agencies of the federal government, as they would if a registrant were suspected of perjury. But when the uncontroverted evidence supporting a registrant's claim places him prima facie within the statutory exemption, dismissal of the claim solely on the basis of suspicion and speculation is both contrary to the spirit of the Act and foreign to our concepts of justice.

Reversed.

MR. JUSTICE JACKSON, whom MR. JUSTICE BURTON and MR. JUSTICE MINTON join, dissenting.

This Court held in *Estep* v. *United States*, 327 U. S. 114, that in a criminal prosecution under § 11 of the Selective Service Act the court must allow the registrant to prove that his local draft board acted without jurisdiction in classifying him for service. The Court cited several examples of a board acting without jurisdiction, such as where a Pennsylvania board orders a citizen and resident of Oregon to report for induction, or where a board bases classification on the registrant's color or creed in direct defiance of the applicable regulations. But the Court then made this statement: "The question of jurisdiction of the local board is reached only if there is *no basis in fact* for the classification which it gave the registrant." (Emphasis added.) The import was that a local board loses jurisdiction if there are insufficient facts in the record to support its conclusion. The ramifications of such a theory were not explored at the time and have not

been clarified by subsequent decisions.[1] But the majority opinion today squarely poses the question of whether such a theory has a place in the statutory scheme of the Selective Service Act.

When he registered for service in September 1948, petitioner was 18 years old and claimed to have been a minister of religion of the Jehovah's Witnesses for some 15 months. He had not been ordained. He had been trained as a radio engineer, still supported himself by doing radio repair work at night, and worked at this job about 40 hours a week. He conducted two religious meetings a week, each lasting an hour, and he occasionally spoke at other meetings. He also made house-to-house calls. He had prepared for the ministry, he said, by reading the Bible and other texts published by the Jehovah's Witnesses and by taking a course. After he filed his classification questionnaire, petitioner gave up his radio repair work and was ordained by baptism. He was purportedly in charge of missionary work "in a 5,400 square mile section of territory." These events on the eve of his classification and in view of his youth may have raised doubt as to his good faith. The local board and the Appeals Board, without citing their reasons, placed petitioner in Class I–A.

No allegation has been made that the local board or the Appeals Board acted fraudulently or maliciously in this matter. The only logical assumption from the classification is that the boards disbelieved part of petitioner's testimony or doubted his good faith in taking up religious work at the particular time he did. The record itself raises some suspicions, and petitioner's ap-

[1] *Eagles* v. *United States ex rel. Samuels*, 329 U. S. 304, 316–317; *Gibson* v. *United States*, 329 U. S. 338; *Sunal* v. *Large*, 332 U. S. 174, 176; *Cox* v. *United States*, 332 U. S. 442, 448, 451–455.

pearance before the local board may well have confirmed these suspicions.

The problem inherent in *Estep* and raised by the majority opinion today is, what is required of the board under such circumstances? It will not do for the Court as in *Estep* to say on the one hand that the board's action is not subject to "the customary scope of judicial review" and that "the courts are not to weigh the evidence," and then on the other to strike down a classification because no affirmative evidence supporting the board's conclusion appears in the record. Under today's decision, it is not sufficient that the board disbelieve the registrant. The board must find and record affirmative evidence that he has misrepresented his case—evidence which is then put to the test of substantiality by the courts. In short, the board must build a record.

There is nothing in the Act which requires this result.[2] To the contrary, the whole tenor of the Act is that the factual question of whether the registrant is entitled to the claimed exemption shall be left entirely in the hands of the board. The philosophy of the Act is that the obligations and privileges of serving in the armed forces should be shared generally, in accordance with a system of selection which is fair and just. 62 Stat. 604, 50 U. S. C. App. §§ 451–471. To that end it decrees "Except as otherwise provided in this title, every male citizen of the United States . . . who is between the ages of nineteen and twenty-six . . . shall be liable for training and

[2] The regulations require the local board to place in the registrant's file for appeal a summary of outside information which was considered by the board. 32 CFR, 1952 Cum. Supp., § 1626.13. We do not interpret this to mean that the board must take the affirmative in securing such information, or that nonevidentiary factors which influenced the board need be summarized, or that in any case these summaries are subject to evaluation by the courts.

service in the armed forces . . . ." 62 Stat. 605, 50 U. S. C. App. § 454 (a). The Act then sets up several deferments and exemptions including that claimed here. It is the usual rule that he who claims the benefit of exceptions in a statute carries the burden of establishing that he is entitled to them. And the decisions of the board on these matters are made "final" by the Act, except where an appeal is authorized. 62 Stat. 620, 50 U. S. C. App. § 460 (b)(3).

Even when we all interpret "final" so as to allow judicial review of the board's jurisdiction, it does not follow that jurisdiction may be lost through a lack of evidence. Despite the comment in *Estep* that the board's action is not subject to ordinary review, the Court continues to examine and weigh these purely factual determinations.

Perhaps what bothers the Court is that when no evidence is introduced against a registrant and the board fails to state its reasons for acting, there is no practical way for the trial court to determine whether the correct statutory standard has been applied. We freely admit the difficulty. However, it is one which the Court should face rather than avoid. Since the record in this case would look the same whether the board acted fraudulently, with a misconception of the law, or in good faith, how is the trial court to proceed in determining the board's jurisdiction? The board, through silence, makes the registrant's task of proving lack of jurisdiction next to impossible.

We think the Act nevertheless requires that in the absence of affirmative proof by the registrant that the board has misconstrued the law or acted arbitrarily, the board's decisions are final and not subject to judicial scrutiny. Whether there is sufficient evidence to grant the exemption is to be left wholly with the board. The Court does not sit here to weigh the evidence. All factual questions are for the board, and its decision is final. The Court

may not set aside the board's finding because the Court might have reached a different conclusion. If it is said that this puts an awesome power in the hands of the selective service authorities, we can only reply that conscription is an awesome business. Congress must have weighed this fact when it passed the Act. It must also have realized that to allow each registrant who is denied exemption a trial on the facts would be to place an impossible block in the way of conscription.

PUBLIC UTILITIES COMMISSION OF CALIFORNIA ET AL. *v.* UNITED AIR LINES, INC. ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA.

No. 87. Argued November 12-13, 1953.—Decided November 30, 1953.

The judgment in this case is reversed on the authority of *Public Service Comm'n* v. *Wycoff Co.*, 344 U. S. 237.
109 F. Supp. 13, reversed.

Wilson E. Cline argued the cause for appellants. With him on the brief was *Everett C. McKeage*.

H. Templeton Brown argued the cause for United Air Lines, Inc. and Catalina Air Transport, appellees. With him on the brief were *Edward F. Treadwell, Reginald S. Laughlin, John T. Lorch* and *Edmund A. Stephan*.

John F. Davis argued the cause for the Civil Aeronautics Board, appellee. With him on the brief were *Acting Solicitor General Stern, Assistant Attorney General Barnes, Ralph S. Spritzer, Emory T. Nunneley, Jr., John H. Wanner* and *O. D. Ozment*.

PER CURIAM.

This case is here on appeal from a judgment of a three-judge court for the Northern District of California. *United Air Lines* v. *California Public Utilities Commission*, 109 F. Supp. 13. The judgment is reversed on authority of *Public Service Commission* v. *Wycoff Co.*, 344 U. S. 237.

Reversed.

THE CHIEF JUSTICE took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE REED concurs, dissenting.

The case seems to me to be peculiarly one for relief by declaratory judgment. The question is whether California or the Federal Government has jurisdiction over the rates which United Air Lines charges for transportation between points on the mainland of California and Catalina Island. Catalina Island is part of California. Therefore, the California Public Utilities Commission claims jurisdiction. But the Civil Aeronautics Act (52 Stat. 973, 49 U. S. C. § 401 *et seq.*) gives the Civil Aeronautics Board authority over rates for transportation "between places in the same State of the United States through the air space over any place outside thereof." United Air Lines and the Board both claim that flights from the mainland to Catalina (which is 30 miles from the mainland) are over the "high seas" and therefore under the exclusive jurisdiction of the Board. That was the view of the District Court. 109 F. Supp. 13. Whether it was right or wrong is the question presented for decision.

The controversy is real and substantial, for the California Commission has directed United to file tariffs, claiming unequivocally jurisdiction over the rates to and from Catalina.

There is nothing to be gained by requiring United to go through the long, laborious, expensive administrative hearings before the California Commission, only to work its way through the hierarchy of courts up again to this Court so that we may determine whether or not the Civil Aeronautics Board has exclusive authority over these rates. Findings that a local agency may make will sometimes aid in reducing friction between the state and federal governments by exposing facts which indicate that the state has a legitimate concern in a complex situation where local and interstate interests are intertwined. No

such situation is presented here. It would, I assume, be conceded that the question of what constitutes the "high seas" is a federal question. The resolution of that question will in no manner be advanced by remitting United to administrative hearings before a commission which—if the District Court below is correct—has no jurisdiction to act.

The Declaratory Judgment Act, 28 U. S. C. § 2201, which operates within the confines of the "case" and "controversy" standards of the Constitution (see *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227), serves many functions for which other remedies were unsuited or which they performed "rather clumsily" or "inadequately," to use the words of the House Report. H. R. Rep. No. 1264, 73d Cong., 2d Sess., p. 2. It was, among other things, "intended to save tedious and costly litigation by ascertaining at the outset the controlling fact or law involved, thus either concluding the litigation or thereafter confining it within more precise limitations." *Id.*, p. 2. And the Senate Report noted that one of the functions served by this form of relief is "the declaration of rights contested under a statute or municipal ordinance, where it was not possible or necessary to obtain an injunction." S. Rep. No. 1005, 73d Cong., 2d Sess., p. 2. Another is the adjudication of disputes "without requiring a destruction of the status quo." *Id.*, p. 6.

Of course the right to an adjudication by way of declaratory relief is not a right that litigants can demand. Its allowance depends on a wise discretion. But unless we are to be intolerant of this procedure which Congress created, we should be reluctant to overrule a District Court when it concludes that the controversy is real and the peril and insecurity imminent, and that time and expense can be saved and good relations promoted by resolving the dispute at its inception rather than when

all sides are exhausted at the end of a long-drawn-out litigation.

Declaratory relief is peculiarly appropriate in case of a jurisdictional controversy which can be settled by a ruling of law. See *Order of Conductors* v. *Swan*, 329 U. S. 520. There is that kind of jurisdictional controversy here, for a federal agency claims that a state commission may not act because Congress put the matter exclusively in the federal domain. In a case less clear than this we enjoined state proceedings after concluding that Congress had pre-empted the field. *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218. By the same token we should settle this controversy at this early stage. By denying relief we advance no cause except that of litigation.

POPE & TALBOT, INC. *v.* HAWN ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 13. Argued October 12, 1953.—Decided December 7, 1953.

Plaintiff, a carpenter employed by an independent contractor, was injured while working on a ship berthed on navigable waters in Pennsylvania. Basing jurisdiction on diversity of citizenship, he brought a civil action for damages against the shipowner in a federal district court in Pennsylvania, alleging negligence and the ship's unseaworthiness. The shipowner pleaded contributory negligence as a defense and brought in the contractor as a third-party defendant, alleging that the injury resulted from the contractor's negligence and claiming recovery against the contractor by way of contribution or indemnity. A jury found that the ship was unseaworthy, that both the shipowner and the contractor were negligent and that the plaintiff's own negligence had contributed to his damages. *Held:* Plaintiff's judgment against the shipowner is affirmed, and the shipowner is not entitled to a judgment against the contractor for contribution. Pp. 407–414.

1. Plaintiff's contributory negligence was not a complete bar to his recovery. Pp. 408–411.

(a) In admiralty, contributory negligence may mitigate, but does not bar, recovery for personal injuries. Pp. 408–409.

(b) Since plaintiff was injured on navigable waters while working on a ship, the basis of his action is a maritime tort; and his rights are not determined by Pennsylvania law. Pp. 409–411.

(c) *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, does not require a different result. Pp. 410–411.

2. Plaintiff's judgment against the shipowner should not be reduced by the amount of compensation payments plaintiff has received from his employer under the Longshoremen's and Harbor Workers' Compensation Act. Pp. 411–412.

3. This Court declines to overrule or distinguish *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85. Pp. 412–413.

4. The plaintiff, not being a seaman, is not barred by *The Osceola*, 189 U. S. 158, from maintaining a negligence action against the shipowner. Pp. 413–414.

5. A judgment for the shipowner against the contractor for contribution is barred by *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U. S. 282. P. 408.

198 F. 2d 800, affirmed.

Mark D. Alspach argued the cause for petitioner. With him on the brief was *Thomas E. Byrne, Jr.*

Charles Lakatos argued the cause for Hawn, respondent. With him on the brief was *Samuel H. Landy.*

Thomas F. Mount argued the cause for Haenn Ship Ceiling & Refitting Corp., respondent. With him on the brief was *Joseph W. Henderson.*

MR. JUSTICE BLACK delivered the opinion of the Court.

The respondent Charles Hawn sustained severe physical injuries when he slipped and fell through an uncovered hatch hole on the petitioner Pope & Talbot's vessel. The ship was then berthed at a pier located in Pennsylvania waters of the Delaware River. Loading of the vessel with grain for a voyage had been temporarily interrupted to make minor repairs on the grain loading equipment. Hawn was doing carpentry work on this equipment to make it spread the grain evenly and thereby balance the ship's load to make the coming voyage safer. He was not an employee of Pope & Talbot's but of the respondent Haenn Ship Ceiling and Refitting Company which had been hired to make these repairs. Hawn brought this civil action in a United States District Court to recover damages for his injuries. His complaint charged that his injuries resulted from the vessel's unseaworthiness and from Pope & Talbot's negligence. In answering, Pope & Talbot denied both charges and set up contributory negligence as a defense to each. In addition, Pope & Talbot brought in Hawn's employer Haenn as a third party defendant, alleging that Haenn's negligence had caused Hawn's injury and claiming recovery over against

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Haenn by way of contribution or indemnity. A jury found that the ship was unseaworthy, that Pope & Talbot had been negligent, that Haenn had been negligent and that Hawn's own negligence had contributed 17½% of his damages. On this basis, the court entered judgment for Hawn against Pope & Talbot for $29,700, 17½% less than the $36,000 at which the jury had fixed his damages. A judgment for contribution by Haenn to Pope & Talbot was also entered. 99 F. Supp. 226, 100 F. Supp. 338. The Court of Appeals affirmed Hawn's judgment against Pope & Talbot. It reversed the judgment of contribution against Haenn. 198 F. 2d 800. This Court granted certiorari. 345 U. S. 990.

The Court of Appeals reversed the judgment for contribution by Haenn on the basis of our holding in *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U. S. 282. In that case we held that contribution could not be exacted under circumstances like those here involved. For that reason we affirm the Court of Appeals reversal of the District Court's judgment against Haenn and proceed to a consideration of the several questions presented by Pope & Talbot as grounds for attack on Hawn's judgment.

First. Petitioner urges that the jury finding of contributory negligence should have been accepted as a complete bar to Hawn's recovery. The contention appears to rest on two separate bases: (a) Admiralty has not developed any definite rule as to the effect of contributory negligence, and therefore the common-law rule under which contributory negligence bars recovery should govern in admiralty, (b) Pennsylvania law controls this case and under that state's law any contributory negligence of an injured person is an insuperable bar to his recovery.

(a) The harsh rule of the common law under which contributory negligence wholly barred an injured person

from recovery is completely incompatible with modern admiralty policy and practice. Exercising its traditional discretion, admiralty has developed and now follows its own fairer and more flexible rule which allows such consideration of contributory negligence in mitigation of damages as justice requires.[1] Petitioner presents no persuasive arguments that admiralty should now adopt a discredited doctrine which automatically destroys all claims of injured persons who have contributed to their injuries in any degree, however slight.

(b) Nor can we agree that Hawn's rights must be determined by the law of Pennsylvania, under which, it is said, any contributory negligence would bar all recovery in this personal injury action. True, Hawn was hurt inside Pennsylvania and ordinarily his rights would be determined by Pennsylvania law. But he was injured on navigable waters while working on a ship to enable it to complete its loading for safer transportation of its cargo by water. Consequently, the basis of Hawn's action is a maritime tort,[2] a type of action which the Constitution has placed under national power to control in "its substantive as well as its procedural features . . . ." *Panama R. Co.* v. *Johnson*, 264 U. S. 375, 386. And Hawn's complaint asserted no claim created by or arising out of Pennsylvania law. His right of recovery for unseaworthiness and negligence is rooted in federal maritime law. Even if Hawn were seeking to enforce a state created remedy for this right, federal maritime law would be controlling. While states may sometimes supplement

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[1] *E. g., The Max Morris*, 137 U. S. 1; *The Arizona* v. *Anelich*, 298 U. S. 110, 122, and cases cited; *Socony-Vacuum Oil Co.* v. *Smith*, 305 U. S. 424, 428–429; *Jacob* v. *New York City*, 315 U. S. 752, 755; and compare *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 244–245, with *Belden* v. *Chase*, 150 U. S. 674.

[2] *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52, 61–63.

federal maritime policies,[3] a state may not deprive a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretative decisions of this Court. These principles have been frequently declared and we adhere to them. See *e. g., Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 243–246, and cases there cited. *Caldarola* v. *Eckert*, 332 U. S. 155, does not support the contention that a state which undertakes to enforce federally created maritime rights can dilute claims fashioned by federal power, which is dominant in this field.

Another argument is that Pennsylvania law must govern here because the District Court's jurisdiction was rested on diversity of citizenship under 28 U. S. C. § 1332.[4] For this contention the principle established in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, is invoked. That case decided that federal district diversity courts must try state created causes of action in accordance with state laws. This ended a long-standing federal court practice under which the outcome of lawsuits to enforce state created causes of action often depended on whether they were tried in a state courthouse or a federal courthouse. *Erie R. Co.* v. *Tompkins* was thus designed to ensure that litigants with the same kind of case would have their rights measured by the same legal standards of liabil-

[3] See *e. g., Just* v. *Chambers*, 312 U. S. 383, 387–392; *Kelly* v. *Washington*, 302 U. S. 1, 13.

[4] The complaint shows diversity which is sufficient to support jurisdiction of the District Court. The complaint also shows that the claim rests on a maritime tort which under the Constitution is subject to dominant control of the Federal Government. In this situation we need not decide whether the District Court's jurisdiction can be rested on 28 U. S. C. § 1331 as arising "under the Constitution, laws or treaties of the United States." See *Doucette* v. *Vincent*, 194 F. 2d 834, and *Jansson* v. *Swedish American Line*, 185 F. 2d 212. Cf. *Jordine* v. *Walling*, 185 F. 2d 662.

ity. It appears to be contended here, however, that one injured on navigable waters who sues in federal court under diversity jurisdiction somehow jeopardizes his right to have as full a recovery as he otherwise would. It is certainly contended that one who sues on the "law side" of the docket has much less chance to recover than one who sues on the "admiralty side." Thus we are asked to use the *Erie-Tompkins* case to bring about the same kind of unfairness it was designed to end. Once again, the substantial rights of parties would depend on which courthouse, or even on which "side" of the same courthouse, a lawyer might guess to be in the best interests of his client. We decline to depart from the principle of equal justice embodied in the *Erie-Tompkins* doctrine. Of course the substantial rights of an injured person are not to be determined differently whether his case is labelled "law side" or "admiralty side" on a district court's docket. *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 88–89.[5] The District Court and Court of Appeals correctly refused to deny Hawn's federal right of recovery by applying the Pennsylvania contributory negligence rule.

Second. Haenn has been making compensation payments to Hawn because of obligations imposed by the Longshoremen's and Harbor Workers' Compensation Act. 44 Stat. 1424, 33 U. S. C. § 901 *et seq.* Hawn has agreed to refund these payments to his employer out of his Pope & Talbot recovery. Pope & Talbot contends that the judgment against it should be reduced by this amount.

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[5] Of a somewhat similar contention this Court said that it did not regard certain words in the Jones Act, 41 Stat. 1007, 46 U. S. C. § 688, "as meaning that the seaman may have the benefit of the new rules if he sues on the law side of the court, but not if he sues on the admiralty side. Such a distinction would be so unreasonable that we are unwilling to attribute to Congress a purpose to make it." *Panama R. Co.* v. *Johnson*, 264 U. S. 375, 391.

It points out that Hawn's verdict includes sums for past loss of wages and medical expenses which it is argued were the very items on account of which Hawn's employer paid him. Consequently Pope & Talbot says that if Hawn keeps the money he will have a double recovery and that to allow him to repay Haenn would give an unconscionable reward to an employer whose negligence contributed to the injury. A weakness in this ingenious argument is that § 33 of the Act has specific provisions to permit an employer to recoup his compensation payments out of any recovery from a third person negligently causing such injuries. Pope & Talbot's contention if accepted would frustrate this purpose to protect employers who are subjected to absolute liability by the Act. Moreover, reduction of Pope & Talbot's liability at the expense of Haenn would be the substantial equivalent of contribution which we declined to require in the *Halcyon* case.

Third. We are asked to reverse this judgment by overruling our holding in *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85. Sieracki, an employee of an independent stevedoring company, was injured on a ship while working as a stevedore loading the cargo. We held that he could recover from the shipowner because of unseaworthiness of the ship or its appliances. We decided this over strong protest that such a holding would be an unwarranted extension of the doctrine of seaworthiness to workers other than seamen. That identical argument is repeated here. We reject it again and adhere to *Sieracki*. We are asked, however, to distinguish this case from our holding there. It is pointed out that Sieracki was a "stevedore." Hawn was not. And Hawn was not loading the vessel. On these grounds we are asked to deny Hawn the protection we held the law gave Sieracki. These slight differences in fact cannot fairly justify the distinction urged as between the two cases. Sieracki's

legal protection was not based on the name "stevedore" but on the type of work he did and its relationship to the ship and to the historic doctrine of seaworthiness. The ship on which Hawn was hurt was being loaded when the grain loading equipment developed a slight defect. Hawn was put to work on it so that the loading could go on at once. There he was hurt. His need for protection from unseaworthiness was neither more nor less than that of the stevedores then working with him on the ship or of seamen who had been or were about to go on a voyage. All were subjected to the same danger. All were entitled to like treatment under law.

Fourth. A concurring opinion here raises a question concerning the right of Hawn to recover for negligence—a question neither presented nor urged by Pope & Talbot. It argues that the *Sieracki* case, by sustaining the right of persons like Hawn to sue for unseaworthiness, placed them in the category of "seamen" who cannot, under *The Osceola*, 189 U. S. 158, maintain a negligence action against the shipowner. *The Osceola* held that a crew member employed by the ship could not recover from his employer for negligence of the master or the crew member's "fellow servants." Recoveries of crew members were limited to actions for unseaworthiness and maintenance and cure. But Hawn was not a crew member. He was not employed by the ship. The ship's crew were not his fellow servants. Having no contract of employment with the shipowner, he was not entitled to maintenance and cure. The fact that *Sieracki* upheld the right of workers like Hawn to recover for unseaworthiness does not justify an argument that the Court thereby blotted out their long-recognized right to recover in admiralty for negligence.[8]

[8] Illustrative of the unbroken line of federal cases holding that persons working on ships for independent contractors or persons rightfully transacting business on ships can recover for damages due

Neither the holding nor what was said in *Sieracki* could support such a contention. In fact, the dissent in *Sieracki* appears to have been predicated on an objection to adding unseaworthiness to the existing right to recover for negligence. It would be strange indeed to hold now that a decision which over the dissent recognized unseaworthiness as an additional right of persons injured on shipboard had unwittingly deprived them of all right to maintain actions for negligence.

Affirmed.

MR. JUSTICE FRANKFURTER, concurring.

We are told that Hawn's "right of recovery for unseaworthiness and negligence is rooted in federal maritime law." No case or student of admiralty is cited in support of this statement.

In 1903, this Court in *The Osceola*, 189 U. S. 158, recognized for the first time the right of crew members to recover for the unseaworthy condition of their ship and denied a right of recovery against the shipowner for negligence. Not until 1920, and then by Act of Congress, 46 U. S. C. § 688, were seamen given the alternatives of suing for negligence or unseaworthiness. See *Pacific S. S. Co.* v. *Peterson*, 278 U. S. 130, 138. As for longshoremen, they could sue their own employer for negligence in not providing safe conditions of work. And in 1926 this Court extended to them the additional benefits of the Jones Act, by construing "seaman" to include a longshore-

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to shipowners' negligence are: *Leathers* v. *Blessing*, 105 U. S. 626 (1882); *The Max Morris*, 137 U. S. 1 (1890); *Gerrity* v. *The Bark Kate Cann*, 2 F. 241 (1880); *The Helios*, 12 F. 732 (1882), decision by Judge Addison Brown; *Grays Harbor Stevedore Co.* v. *Fountain*, 5 F. 2d 385 (1925); *Tide Water Associated Oil Co.* v. *Richardson*, 169 F. 2d 802 (1948); *Brady* v. *Roosevelt S. S. Co.*, 317 U. S. 575, 577 (1943). See also cases collected in 44 A. L. R. 1025–1034.

man. *International Stevedoring Co.* v. *Haverty*, 272 U. S. 50. Congress, preferring a different mode of recovery for longshoremen than for seamen, displaced their right to sue their employer for negligence by a workmen's compensation act applicable solely to longshoremen, 33 U. S. C. § 901 *et seq.* Like other business invitees, such as passengers and freight consignees, longshoremen could also sue the shipowner for negligence. Then on April 22, 1946, this Court in *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, for the first time extended to longshoremen the right to recover for unseaworthiness from the owner of the ship. The decision was based on the fact that longshoremen were doing seamen's work and that therefore they should be entitled to a seamen's remedy. Until today, this Court has never held that longshoremen have the alternative rights of action for negligence or unseaworthiness which the Jones Act gave to crew members. This summary history hardly shows such deep roots of the alternative rights of recovery that this Court should needlessly decide that such rights exist.

I would affirm the judgment of the Court of Appeals, because the separate finding that the ship was unseaworthy supports recovery.[1] This, of course, assumes Hawn was the kind of worker who we held in *Sieracki* could recover for unseaworthiness.

The right of seamen to recover for unseaworthiness is peculiarly a cause of "admiralty and maritime jurisdiction," 1 Stat. 73, 77. The right is in the nature of liability without fault for which contributory negligence is not a bar to recovery, although it may be relevant in assessing the damages. *Seas Shipping Co.* v. *Sieracki, supra. Erie*

[1] No objection was raised at any point in this case to the trial by jury, so the question is not before us whether the plaintiff was entitled to a jury in a suit based on both maritime and common-law causes of action.

R. Co. v. *Tompkins*, 304 U. S. 64, is irrelevant in that unseaworthiness is a federally created right, so state law on a state cause of action is not an issue. We should not commingle federal admiralty and state common-law and should not engraft onto the federally created right to recover for unseaworthiness a common-law defense foreign to that right.

If negligence were the only count in the complaint and the jury found it, or if the jury had found the ship seaworthy but sustained the negligence claim, different considerations would come into play not now before us. The opinion below indicates that the application of Pennsylvania law would have completely barred recovery, since the plaintiff was contributorily negligent. Therefore, to recover solely on the basis of Pope and Talbot's negligence, Hawn would have to rely on a federal maritime cause of action for negligence to which contributory negligence is not a bar. Whether such a cause of action would be available in this case is a difficult question which should not be decided here, since its disposition is unnecessary in view of the separate finding of unseaworthiness.

Both before and after this Court's decision in *The Osceola*, recognizing the right of crew members to recover for unseaworthiness, longshoremen recovered for negligence—often described as "negligence of the ship"—as did other business invitees. Compare *Leathers* v. *Blessing*, 105 U. S. 626, with *The Max Morris*, 137 U. S. 1. Although these were cases where the elements of unseaworthiness were probably present, courts rarely used that term. The plaintiff's default in such cases did not bar recovery altogether, however, but rather served to reduce the damages to be awarded.

In *Sieracki*, this Court assimilated longshoremen to seamen and held that they could recover for unseaworthiness. That decision inevitably raises doubts whether longshoremen are still entitled to recover against a shipowner for

negligence, except insofar as a state right of action for negligence, to which the state rule on contributory negligence would be applicable, is enforceable. Cf. *The Hamilton*, 207 U. S. 398. For *The Osceola*, in recognizing crew members' right of action for unseaworthiness, also held that they had no such right against the shipowner for negligence.[2] Did *Sieracki*, in holding that longshoremen laboring like seamen of old in the "service of the ship" were entitled to recover for unseaworthiness, leave them also with the negligence cause of action which *The Osceola* denied to seamen?[3]

On the one hand, it may be urged that *Sieracki* broadened the rights of shore workers; it gave them a seaman's status without depriving them of the right of action they had before they attained that status. On the other, it may be urged with equal reason that a longshoreman should not be able to "play it both ways": be entitled, that is, to a seaman's remedy for unseaworthiness and also enjoy recovery from the shipowner for negligence which, prior to the Jones Act, was denied to a seaman. He would thus have available two non-statutory remedies to recover damages for his injuries, while the crew mem-

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[2] Although this holding was based in part on the fellow-servant rule, it went further. For it stated that while it was doubtful whether the master of the ship was a fellow servant, the crew member could not recover against the owner for the master's negligence. *The Osceola's* holding that negligence is not available as a cause of action against the shipowner has been reaffirmed by this Court in *Mahnich* v. *So. S. S. Co.*, 321 U. S. 96, and *Chelentis* v. *Luckenbach S. S. Co.*, 247 U. S. 372.

[3] The *Sieracki* case itself was wholly unconcerned with a stevedore's right to recover for negligence of the shipowner and also hold him for unseaworthiness. There is not the remotest intimation in either the majority or the minority opinion that any thought was given to the question whether the stevedore was to have these two rights, although a member of the crew was denied them prior to the Jones Act and the Jones Act does not apply to longshoremen.

ber, the true "ward of admiralty," has only one. And the fact that Congress in the Jones Act has given crew members a statutory cause of action for negligence hardly justifies this Court's according longshoremen alternative remedies, any more than we should now define the crew members' rights as including compensation under the Longshoremen's and Harbor Workers' Compensation Act.

Since unseaworthiness affords longshoremen recovery without fault and has been broadly construed by the courts, *e. g., Mahnich* v. *So. S. S. Co.*, note 2, *supra*, it will be rare that the circumstances of an injury will constitute negligence but not unseaworthiness. Even if such a case should arise, the longshoreman, were he barred from suing the shipowner for negligence, has available the statutory remedy against his employer which Congress has given him in the Longshoremen's and Harbor Workers' Compensation Act.

But the practical importance of the question is no measure of its difficulty. It raises subtle issues of such judicial lawmaking as is the main source of maritime law. We ought not to embarrass future answers to such a question by premature pronouncements, especially without the benefit of mature submissions by counsel.

Since the *Erie* problem is not here, it is also irrelevant to decide what remedy a state court could give or decline to give. We should not even imply that if suit had been brought in a state court and the Supreme Court of Pennsylvania had held that its law prevented a contributorily negligent plaintiff from recovering in Pennsylvania courts, we would overrule that judgment and require the state courts to provide a remedy.

Of course, when state courts purport to enforce federally created rights, they must apply the contents of those rights as determined by this Court. *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239. But whether it is federal law that a state court is enforcing or the state fails

to afford a remedy in its courts is too complicated a question to be passed upon when not before us. The answer depends much too much on what the state court decides. *E. g., Caldarola* v. *Eckert,* 332 U. S. 155.

MR. JUSTICE JACKSON, with whom MR. JUSTICE REED and MR. JUSTICE BURTON join, dissenting.

It may be conducive to a dispassionate consideration of the law of this case to remind ourselves that the plaintiff below unquestionably was covered by the Longshoremen's and Harbor Workers' Compensation Act. Nobody questions his right to all that other injured harbor workers usually receive for like injury or to what this plaintiff would receive for the same injuries if suffered under slightly different circumstances. What is in issue here is a bonus recovery over and above the statutory scale of compensation that Congress has established for injured harbor workers in general, which this plaintiff claims only because of special circumstances said to create a liability by a third party, a bareboat charterer we will refer to as the shipowner.

This decision seems to me to so confuse maritime law with common and statutory tort law as to destroy the integrity of the former as a separate system based on the peculiarities and risks of seagoing labor.

1. DIVERSITY OF CITIZENSHIP AND PENNSYLVANIA STATE LAW.

This case was instituted on the law side of federal district court, the complaint specifically alleging that "jurisdiction is based on diversity of citizenship" and pleading the other requisites of that jurisdiction. After amendment, the complaint alleged both ordinary common-law negligence and lack of seaworthiness against the shipowner. As I shall presently point out, the allegations of negligence could not have been an invocation of the

Federal Jones Act, which affords to seamen a federal remedy for negligence. It appears to have been an invocation of the negligence law of the Commonwealth of Pennsylvania, in the territorial waters of which the injury was sustained. This may have been permissible because § 9 of the Judiciary Act of 1789, 1 Stat. 76–77, gave the District Courts of the United States "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction . . . ; saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it . . . ." Under this reservation it would appear that there is considerable room for application of state law, although I do not undertake to guess how much. Cf. *Caldarola* v. *Eckert*, 332 U. S. 155.

This being the form of action, the plaintiff had a jury trial. The court's instructions scrambled common-law negligence doctrines with admiralty principles of indemnity for unseaworthiness.

But, as a diversity action based on the tort law of Pennsylvania, plaintiff's case must fail because the jury, in answer to special interrogatories, reported that the plaintiff himself was guilty of negligence which contributed 17½% to his injuries. Under *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, the law of the state of injury would apply to the case and, under Pennsylvania law, contributory negligence defeats recovery. Therefore, some other basis must be found to sustain the verdict.

2. ACTION FOR NEGLIGENCE.

The failure of maritime law to afford a remedy for negligence, *The Osceola*, 189 U. S. 158, was overcome by the Federal Jones Act, 46 U. S. C. § 688 *et seq.*, which provides an action for negligence with jury trial. But this plaintiff's difficulties, under this Act, were so formidable that his counsel makes no claim that the recovery can rest upon it. Notwithstanding this, case after case

which was decided under the Jones Act is cited by the Court today, which implies that the Court relies on the Jones Act to help out in some way toward supporting the recovery here. But that Act gives a right of action only against the employer, and this plaintiff was not employed by the shipowner. Moreover, the Jones Act gives its right of action only to seamen, and this claimant is not a seaman.

It is clear that Congress provided the compensation remedy, not the Jones Act remedy, for such a case as this. In *International Stevedoring Co.* v. *Haverty*, 272 U. S. 50, this Court attempted to allow recovery by a longshoreman against his employer under the Jones Act. Immediately Congress passed the Longshoremen's and Harbor Workers' Compensation Act, which made exclusive, as against the employer, the compensation remedy it conferred on longshoremen and harbor workers. So the Jones Act is not available to support a recovery against this plaintiff's employer because of provisions of the compensation Act, nor against the shipowner because the Jones Act makes no one liable who is not an employer. Therefore, as a tort action this case cannot be sustained under the Federal Act.

If plaintiff was invoking Pennsylvania negligence law—the ordinary law of the business invitee—he cannot recover because he was contributorily negligent. The only possible basis for recovery is a maritime tort. The question is a tricky and difficult one, resurrecting old cases which involved many aspects of maritime law no longer in force. In any event, the charge below so scrambled two theories of recovery that the jury could not possibly have had a fair understanding of the law of the case. The jury was instructed on the one hand that negligence was not necessary to recovery because of the unseaworthiness theory and on the other that negligence itself was a basis for recovery. The least petitioner was entitled

to was a submission which would eliminate the confusing doctrine of liability without fault not applicable to the case.

3. INDEMNITY FOR UNSEAWORTHINESS.

Along with the claim of common-law negligence there was submitted to the jury in this case, as an alternative basis of liability, the claim that the ship was unseaworthy. It is true that a seaman has a right to indemnity or compensatory damages where he can show injury from unseaworthiness of the ship.

As was explained in *The Osceola*, *supra*, at 171, this was adopted into our maritime law from British legislation, wherein "in every contract of service, express or implied, between an owner of a ship and the master or any seaman thereof, there is an obligation implied that all reasonable means shall be used to insure the seaworthiness of the ship before and during the voyage." This obligation was adopted into American admiralty law as a warranty of seaworthiness, of which the owner is not relieved by exercise of due diligence and which rests on wholly different principles from those of negligence. *Mahnich* v. *Southern S. S. Co.*, 321 U. S. 96, 100. But this case was begun, tried, submitted and decided as a negligence action, while it is sustained here on an admiralty doctrine of liability for breach of warranty which does not at all depend upon negligence.

The principal reliance of the Court is on *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85. That decision advanced a novel holding that the traditional warranty of seaworthiness extended not only to seamen but also to longshoremen. This was a virtual repetition of the Court's earlier effort in the *International Stevedoring Co.* case, *supra*, to give seamen's remedies to longshoremen, an effort which was promptly rebuffed by Congress when it enacted the Longshoremen's and Harbor Workers' Compensation Act

to preserve the traditional distinction. But a much greater departure than that which Congress rejected must be taken here if the warranty of seaworthiness is to be further expanded to sustain this recovery. There may be some logic in saying that when a longshoremen or stevedore is brought aboard to load a ship, the ship should be fit for sailing. But it seems to me that the extension of this implied warranty to a repair crew which works for an independent contractor is unjustified. The Court can cite no authority for such a holding, and I think there is no logic in it.

This claimant was a carpenter in the employ of a ship repairing company. That company had a contract to make certain repairs aboard this ship and the claimant was sent aboard by his employer, under whose direction he worked. It does not seem to me that one who hires a contracting firm to put his ship in seaworthy condition guarantees that it is in seaworthy condition before the work starts. If everything were shipshape, he would not need the services of the repairmen.

I think that the expansion of the warranty of seaworthiness from a seaman to a repairman is illogical, contrary to any decisional law and not consistent with the scheme of Congress to maintain a sharp distinction between the seafaring man and the harbor worker.

From ancient times admiralty has given to seamen rights which the common law did not give to landsmen, because the conditions of sea service were different from conditions of any other service, even harbor service. The seaman on board a merchant ship ties his fate to that of the ship and joins its separate community for the voyage. Under earlier conditions seagoing labor was extremely hard. Voyages were long, tedious and treacherous. Shipwreck, stranding, capture by pirates, fire, and other eventualities threatened. Scurvy was common, and the ships were little prepared to combat disease. Discipline

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was harsh and cruel, and savage punishments were inflicted. Poor food, cramped quarters, long hours and complete subjection to the will of the master was the rule. While his lot has been ameliorated, even under modern conditions the seagoing laborer suffers an entirely different discipline and risk than does the harbor worker. His fate is still tied to that of the ship. His freedom is restricted. He is under an unusual discipline and is dependent for his food, medicine, care and welfare upon the supplies of the ship. Contrast the lot of this plaintiff who lived at home, was free to leave his employment, took no risks of the sea and had no different condition or hazard attached to his employment than would have attached to a carpentry job in a building ashore.

That the sharp differentiation Congress made in the rights of seamen as contrasted with harbor workers has a basis in differences in risk and working conditions will be apparent from a study of 46 U. S. C., c. 18, which governs merchant seamen. I point out some of the most obvious respects in which this claimant's position as a land-based laborer, free to bargain, strike or quit, and subject to no extraordinary hazards, differed from that of most seamen (there are certain exceptions) who are employed as a part of the ship's crew.

The Government superintends the engagement and discharge of seamen and apprentices and the terms and execution of their contract, and provides for their presence on board at the proper time. §§ 545, 561, 565. A master and the vessel are subject to penalties for taking on a seaman as one of the crew except by virtue of an agreement under such supervision. §§ 567–568, 575. But the penalties are not all on the master and the vessel. Every contract must provide the day and hour when the seaman shall render himself on board the ship. If the seaman shall neglect to be on board at the time mentioned without giving twenty-four hours' notice of his inability, he may

forfeit for every hour which he shall so neglect to render himself one-half of one day's pay. If he wholly neglects to appear or deserts, he shall forfeit all of his wages and emoluments. § 576. Unlike the land laborer, the seaman may forfeit his wages if he has not "exerted himself to the utmost to save the vessel, cargo, and stores . . . ." § 592. The seaman may not be paid any wages in advance of the time he has earned the same, and his assignment or allotment to dependents of his wages is restricted. § 599. The seaman is deprived of credit, for no sum exceeding one dollar shall be recoverable from him by any one person for any debt contracted during his service. § 602.

It is so important to the seaman that the ship be seaworthy that a majority of the crew may complain that the vessel is unseaworthy or unfit in crew, body, tackle, apparel, furniture, provisions or stores to proceed on an intended voyage and thereupon require an inquiry and a determination, and, if the charge is not sustained and the seamen refuse to proceed, they shall forfeit any wages due them. §§ 653, 655. So dependent are they that the Government provides inspection of the crew quarters, which must comply with standards, §§ 660–1, 660a, and the seamen may complain as to the provisions or water and obtain an examination. § 662.

More importantly, the seaman is not a free man. He may not, as the longshoreman or harbor worker may, protect himself by striking or quitting the job. Desertion, refusing without reasonable cause to join his vessel, absence without leave at any time within twenty-four hours of the vessel's sailing from any port, or absence from his vessel and from his duty at any time without leave and without sufficient reason, or quitting the vessel without leave after arrival at port and before she is in security, are all punishable by certain forfeitures of his wages. Moreover, at the option of the master, willful

disobedience to any lawful command at sea is punishable by being placed in irons until such disobedience shall cease, and for continued willful disobedience to such command or neglect of duty the seaman may be placed in irons and four days out of five on bread and water until such disobedience shall cease. To these penalties are added certain other forfeitures. § 701. There is more, but this is enough to demonstrate that Congress knew and respected the difference between the seaman to whom it preserved admiralty remedies plus the remedies of the Jones Act, and harbor workers, such as this claimant, who are given the remedies of the compensation Act, like most other shore workers.

I cannot bring myself to believe that it is either the congressional will or the tradition of maritime law or common sense to mingle the two wholly separate types of labor in their remedies as is being done in this case. There are other questions in the case as to division of the damages which I need not discuss, in view of my conclusion that there is no basis for recovery. I would reverse the judgment below.

WILKO *v.* SWAN ET AL., DOING BUSINESS AS HAYDEN, STONE & CO., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 39. Argued October 21, 1953.—Decided December 7, 1953.

In an action brought by a customer against a securities brokerage firm to recover damages, under the civil liabilities provisions of § 12 (2) of the Securities Act of 1933, for alleged misrepresentation in the sale of securities, *held* that an agreement for arbitration of any controversy arising in the future between the parties was void under § 14, notwithstanding the provisions of the United States Arbitration Act. Pp. 428–438.

(a) The agreement to arbitrate future controversies was void under § 14 of the Securities Act as a "stipulation" binding the customer to "waive compliance" with a "provision" of the Act. Pp. 432–435.

(b) The right of an aggrieved person under § 22 (a) to select the judicial forum is a "provision" of the Securities Act that cannot be waived under § 14 thereof. Pp. 434–438.

(c) As the protective provisions of the Securities Act require the exercise of judicial direction to fairly assure their effectiveness, Congress must have intended § 14 to apply to waiver of judicial trial and review. P. 437.

201 F. 2d 439, reversed.

Petitioner sued respondents to recover damages under the Securities Act of 1933. Respondents' motion to stay the action, pursuant to § 3 of the United States Arbitration Act, was denied by the District Court. 107 F. Supp. 75. The Court of Appeals reversed. 201 F. 2d 439. This Court granted certiorari. 345 U. S. 969. *Reversed*, p. 438.

Richard H. Wels argued the cause for petitioner. With him on the brief was *Henry E. Mills*.

By special leave of Court, *William H. Timbers* argued the cause for the Securities and Exchange Commission,

as *amicus curiae*, urging reversal. With him on the brief were *Acting Solicitor General Stern, Roger S. Foster* and *Alexander Cohen.*

Horace G. Hitchcock argued the cause for respondents. With him on the brief were *Ralph D. Ray* and *Francis E. Koch.*

MR. JUSTICE REED delivered the opinion of the Court.

This action by petitioner,* a customer, against respondents, partners in a securities brokerage firm, was brought in the United States District Court for the Southern District of New York, to recover damages under § 12 (2) of the Securities Act of 1933.[1] The complaint alleged that on or about January 17, 1951, through the instrumentalities of interstate commerce, petitioner was induced by Hayden, Stone and Company to purchase

*The Securities and Exchange Commission participated as *amicus curiae* throughout this case and has shared petitioner's burden in presenting the case to the Court.

[1] 48 Stat. 74, 15 U. S. C. § 77a *et seq.* § 12 (2), 48 Stat. 84, 15 U. S. C. § 77*l* (2), provides: "Any person who— . . . .

"(2) sells a security (whether or not exempted by the provisions of section 77c of this title, other than paragraph (2) of subsection (a) of said section 77c), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission, shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security."

1,600 shares of the common stock of Air Associates, Incorporated, by false representations that pursuant to a merger contract with the Borg Warner Corporation, Air Associates' stock would be valued at $6.00 per share over the then current market price, and that financial interests were buying up the stock for the speculative profit. It was alleged that he was not told that Haven B. Page (also named as a defendant but not involved in this review [2]), a director of, and counsel for, Air Associates was then selling his own Air Associates' stock, including some or all that petitioner purchased. Two weeks after the purchase, petitioner disposed of the stock at a loss. Claiming that the loss was due to the firm's misrepresentations and omission of information concerning Mr. Page, he sought damages.

Without answering the complaint, the respondent moved to stay the trial of the action pursuant to § 3 of the United States Arbitration Act [3] until an arbitration in accordance with the terms of identical margin agreements was had. An affidavit accompanied the motion stating that the parties' relationship was controlled by the terms of the agreements and that while the firm was willing to arbitrate petitioner had failed to seek or proceed with any arbitration of the controversy.

Finding that the margin agreements provide that arbitration should be the method of settling all future

[2] See *Wilko* v. *Swan*, 201 F. 2d 439, 445.

[3] 9 U. S. C. (Supp. V, 1952) § 1 *et seq.* § 3 provides:

"If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."

controversies, the District Court held that the agreement to arbitrate deprived petitioner of the advantageous court remedy afforded by the Securities Act, and denied the stay.[4] A divided Court of Appeals concluded that the Act did not prohibit the agreement to refer future controversies to arbitration, and reversed.[5]

The question is whether an agreement to arbitrate a future controversy is a "condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision" of the Securities Act which § 14[6] declares "void." We granted certiorari, 345 U. S. 969, to review this important and novel federal question affecting both the Securities Act and the United States Arbitration Act. Cf. *Frost & Co.* v. *Coeur D'Alene Mines Corp.*, 312 U. S. 38, 40.

As the margin agreement in the light of the complaint evidenced a transaction in interstate commerce, no issue arises as to the applicability of the provisions of the United States Arbitration Act to this suit, based upon the Securities Act. 9 U. S. C. (Supp. V, 1952) § 2. Cf. *Tejas Development Co.* v. *McGough Bros.*, 165 F. 2d 276, 278, with *Agostini Bros. Bldg. Corp.* v. *United States*, 142 F. 2d 854. See Sturges and Murphy, Some Confusing Matters Relating to Arbitration, 17 Law & Contemp. Prob. 580.

In response to a Presidential message urging that there be added to the ancient rule of *caveat emptor* the further doctrine of "let the seller also beware," [7] Congress passed

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[4] *Wilko* v. *Swan*, 107 F. Supp. 75.

[5] *Wilko* v. *Swan*, 201 F. 2d 439.

[6] 48 Stat. 84, 15 U. S. C. § 77n. § 14 provides:

"Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void."

[7] H. R. Rep. No. 85, 73d Cong., 1st Sess. 2.

the Securities Act of 1933. Designed to protect investors,[8] the Act requires issuers, underwriters, and dealers to make full and fair disclosure of the character of securities sold in interstate and foreign commerce and to prevent fraud in their sale.[9] To effectuate this policy, § 12 (2) created a special right to recover for misrepresentation which differs substantially from the common-law action in that the seller is made to assume the burden of proving lack of scienter.[10] The Act's special right is enforceable in any court of competent jurisdiction—federal or state—and removal from a state court is prohibited. If suit be brought in a federal court, the purchaser has a wide choice of venue, the privilege of nation-wide service of process and the jurisdictional $3,000 requirement of diversity cases is inapplicable.[11]

The United States Arbitration Act establishes by statute the desirability of arbitration as an alternative to the complications of litigation. The reports of both Houses on that Act stress the need for avoiding the delay and expense of litigation,[12] and practice under its terms raises

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[8] S. Rep. No. 47, 73d Cong., 1st Sess. 1. See *Oklahoma-Texas Trust* v. *S. E. C.*, 100 F. 2d 888, 891.

[9] 48 Stat. 74, Preamble; 48 Stat. 77, 15 U. S. C. § 77d. See *Frost & Co.* v. *Coeur D'Alene Mines Corp.*, 312 U. S. 38, 40.

[10] See note 1, *supra*. "Unless responsibility is to involve merely paper liability it is necessary to throw the burden of disproving responsibility for reprehensible acts of omission or commission on those who purport to issue statements for the public's reliance. . . . To impose a lesser responsibility would nullify the purposes of this legislation." H. R. Rep. No. 85, 73d Cong., 1st Sess. 9–10.

[11] § 22 (a), 48 Stat. 86, as amended 49 Stat. 1921, 15 U. S. C. § 77v (a). See *Deckert* v. *Independence Shares Corp.*, 311 U. S. 282, 289. Existing remedies at law and equity are retained. § 16, 48 Stat. 84, 15 U. S. C. § 77p.

[12] H. R. Rep. No. 96, 68th Cong., 1st Sess. 1–2; S. Rep. No. 536, 68th Cong., 1st Sess. 3. See *Marine Transit Corp.* v. *Dreyfus*, 284 U. S. 263.

hope for its usefulness both in controversies based on statutes [13] or on standards otherwise created.[14] This hospitable attitude of legislatures and courts toward arbitration, however, does not solve our question as to the validity of petitioner's stipulation by the margin agreements, set out below, to submit to arbitration controversies that might arise from the transactions.[15]

Petitioner argues that § 14, note 6, *supra*, shows that the purpose of Congress was to assure that sellers could not maneuver buyers into a position that might weaken their ability to recover under the Securities Act. He contends that arbitration lacks the certainty of a suit at law under the Act to enforce his rights. He reasons that the arbitration paragraph of the margin agreement is a stipulation that waives "compliance with" the pro-

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[13] *Agostini Bros. Bldg. Corp.* v. *United States*, 142 F. 2d 854; *Watkins* v. *Hudson Coal Co.*, 151 F. 2d 311; *Donahue* v. *Susquehanna Collieries Co.*, 138 F. 2d 3; *Donahue* v. *Susquehanna Collieries Co.*, 160 F. 2d 661; *Evans* v. *Hudson Coal Co.*, 165 F. 2d 970.

[14] *Marine Transit Corp.* v. *Dreyfus*, 284 U. S. 263; *Kentucky River Mills* v. *Jackson*, 206 F. 2d 111; *Campbell* v. *American Fabrics Co.*, 168 F. 2d 959; *Columbian Fuel Corp.* v. *United Fuel Gas Co.*, 72 F. Supp. 843, affirmed, 165 F. 2d 746; *Matter of Springs Cotton Mills* (Buster Boy Suit Co.), 275 App. Div. 196, 88 N. Y. S. 2d 295, affirmed, 300 N. Y. 586, 89 N. E. 2d 877; *White Star Mining Co.* v. *Hultberg*, 220 Ill. 578, 77 N. E. 327; *Oregon-Washington R. & N. Co.* v. *Spokane, P. & S. R. Co.*, 83 Ore. 528, 163 P. 600; Sturges, Commercial Arbitrations and Awards, pp. 502, 793–798.

[15] "Any controversy arising between us under this contract shall be determined by arbitration pursuant to the Arbitration Law of the State of New York, and under the rules of either the Arbitration Committee of the Chamber of Commerce of the State of New York, or of the American Arbitration Association, or of the Arbitration Committee of the New York Stock Exchange or such other Exchange as may have jurisdiction over the matter in dispute, as I may elect. Any arbitration hereunder shall be before at least three arbitrators."

vision of the Securities Act, set out in the margin, conferring jurisdiction of suits and special powers.[16]

Respondent asserts that arbitration is merely a form of trial to be used in lieu of a trial at law,[17] and therefore no conflict exists between the Securities Act and the United States Arbitration Act either in their language or in the congressional purposes in their enactment. Each may function within its own scope, the former to protect investors and the latter to simplify recovery for actionable violations of law by issuers or dealers in securities.

Respondent is in agreement with the Court of Appeals that the margin agreement arbitration paragraph, note 15, *supra*, does not relieve the seller from either liability or burden of proof, note 1, *supra*, imposed by the Securities Act.[18] We agree that in so far as the award in arbitra-

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[16] 48 Stat. 86, as amended, 49 Stat. 1921, 15 U. S. C. § 77v (a). § 22 (a) provides:

"The district courts of the United States . . . shall have jurisdiction . . . concurrent with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections [1292–93] and [1254] of Title 28. No case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States. . . ." See note 11, *supra*.

[17] See *Murray Oil Products Co.* v. *Mitsui & Co.*, 146 F. 2d 381, 383; *American Locomotive Co.* v. *Chemical Research Corp.*, 171 F. 2d 115, 120.

[18] "Paragraph 3 of the margin agreement provides that all transactions 'shall be subject to the provisions of the Securities Exchange Act of 1934 and present and future acts amendatory thereto [15 U. S. C. A. § 78a et seq.].' It contains no express mention of the

tion may be affected by legal requirements, statutes or common law, rather than by considerations of fairness, the provisions of the Securities Act control.[18] This is true even though this proposed agreement has no requirement that the arbitrators follow the law. This agreement of the parties as to the effect of the Securities Act includes also acceptance of the invalidity of the paragraph of the margin agreement that relieves the respondent sellers of liability for all "representation or advice by you or your employees or agents regarding the purchase or sale by me of any property . . . ."

The words of § 14, note 6, *supra*, void any "stipulation" waiving compliance with any "provision" of the Securities Act. This arrangement to arbitrate is a "stipulation,"

Securities Act of 1933. If reference to the 1934 Act were construed as excluding the 1933 Act, it might be argued that the agreement did not provide for arbitration of a controversy as to the liability of Hayden, Stone & Co. under section 12 (2) of the 1933 Act. But we do not think the principle of *expressio unius est exclusio alterius* is here applicable. It may well be that the phrase 'present * * * acts * * * supplemental' to the 1934 Act should be construed to include the 1933 Act. In any event the sale transaction would necessarily be subject to that Act. Therefore the *amicus* does not regard it as material whether or not the agreement purports to make that statute applicable. We agree, and shall proceed to a consideration of the question decided below, namely, whether the 1933 Act evidences a public policy which forbids referring the controversy to arbitration." 201 F. 2d, at 443.

The paragraph of the agreement referred to by the Court of Appeals as "3" reads as follows:

"All transactions made by you or your agents for me are to be subject to the constitutions, rules, customs and practices of the exchanges or markets where executed and of their respective clearing houses and shall be subject to the provisions of the Securities Exchange Act of 1934 and present and future acts amendatory thereof or supplemental thereto, and to the rules and regulations of the Federal Securities and Exchange Commission and of the Federal Reserve Board insofar as they may be applicable . . . ."

[19] See Sturges, Commercial Arbitrations and Awards, p. 500.

and we think the right to select the judicial forum is the kind of "provision" that cannot be waived under § 14 of the Securities Act. That conclusion is reached for the reasons set out above in the statement of petitioner's contention on this review. While a buyer and seller of securities, under some circumstances, may deal at arm's length on equal terms, it is clear that the Securities Act was drafted with an eye to the disadvantages under which buyers labor. Issuers of and dealers in securities have better opportunities to investigate and appraise the prospective earnings and business plans affecting securities than buyers. It is therefore reasonable for Congress to put buyers of securities covered by that Act on a different basis from other purchasers.

When the security buyer, prior to any violation of the Securities Act, waives his right to sue in courts, he gives up more than would a participant in other business transactions. The security buyer has a wider choice of courts and venue. He thus surrenders one of the advantages the Act gives him and surrenders it at a time when he is less able to judge the weight of the handicap the Securities Act places upon his adversary.

Even though the provisions of the Securities Act, advantageous to the buyer, apply, their effectiveness in application is lessened in arbitration as compared to judicial proceedings. Determination of the quality of a commodity [20] or the amount of money due under a contract is not the type of issue here involved.[21] This case requires subjective findings on the purpose and knowledge

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[20] *Campe Corp. v. Pacific Mills*, 87 N. Y. S. 2d 16, reversed, 275 App. Div. 634, 92 N. Y. S. 2d 347.

[21] *Evans v. Hudson Coal Co.*, 165 F. 2d 970; *Donahue v. Susquehanna Collieries Co.*, 160 F. 2d 661; *Watkins v. Hudson Coal Co.*, 151 F. 2d 311; *Donahue v. Susquehanna Collieries Co.*, 138 F. 2d 3; *Agostini Bros. Bldg. Corp. v. United States*, 142 F. 2d 854; *American Almond Prod. Co. v. Consolidated Pecan S. Co.*, 144 F. 2d 448.

of an alleged violator of the Act. They must be not only determined but applied by the arbitrators without judicial instruction on the law. As their award may be made without explanation of their reasons and without a complete record of their proceedings, the arbitrators' conception of the legal meaning of such statutory requirements as "burden of proof," "reasonable care" or "material fact," see note 1, *supra*, cannot be examined. Power to vacate an award is limited.[22] While it may be true, as the Court of Appeals thought, that a failure of the arbitrators to decide in accordance with the provisions of the Securities Act would "constitute grounds for vacating the award pursuant to section 10 of the Federal Arbitration Act," [23] that failure would need to be made clearly to appear. In unrestricted submissions, such as the present margin agreements envisage, the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error

[22] 9 U. S. C. (Supp. V, 1952) § 10:

"In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

"(a) Where the award was procured by corruption, fraud, or undue means.

"(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

"(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

"(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

"(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators."

[23] *Wilko* v. *Swan*, 201 F. 2d 439, 445.

in interpretation.[24] The United States Arbitration Act contains no provision for judicial determination of legal issues such as is found in the English law.[25] As the protective provisions of the Securities Act require the exercise of judicial direction to fairly assure their effectiveness, it seems to us that Congress must have intended § 14, note 6, *supra*, to apply to waiver of judicial trial and review.[26]

This accords with *Boyd* v. *Grand Trunk Western R. Co.*, 338 U. S. 263.[27] We there held invalid a stipulation restricting an employee's choice of venue in an action under the Federal Employers' Liability Act. Section 6 of that Act permitted suit in any one of several localities and § 5 forbade a common carrier's exempting itself from any liability under the Act.[28] Section 5 had been adopted to avoid contracts waiving employers' liability.[29] It is

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[24] *Burchell* v. *Marsh*, 17 How. 344, 349; *United States* v. *Farragut*, 22 Wall. 406, 413, 419–421 (note the right of review); *Kleine* v. *Catara*, 14 Fed. Cas. 732, No. 7,869; *Texas & P. R. Co.* v. *St. Louis Southwestern R. Co.*, 158 F. 2d 251, 256; *The Hartbridge*, 62 F. 2d 72, 73. In *Mutual Benefit Health & Acc. Assn.* v. *United Cas. Co.*, 142 F. 2d 390, 393, the problem was dealt with on the basis of the Massachusetts law. See Sturges, note 19, *supra*; Note, Judicial Review of Arbitration Awards on the Merits, 63 Harv. L. Rev. 681, 685, Award Based on Erroneous Rule; Cox, The Place of Law in Labor Arbitration, XXXIV Chicago Bar Rec. 205.

[25] Arbitration Act, 1950, 14 Geo. VI, c. 27, § 21, 29 Halsbury's Statutes of England (2d ed.) p. 106.

[26] Cf. notes 66 Harv. L. Rev. 1326; 53 Col. L. Rev. 735; 41 Georgetown L. J. 565; 62 Yale L. J. 985.

[27] See also, *Krenger* v. *Pennsylvania R. Co.*, 174 F. 2d 556; *Akerly* v. *New York Cent. R. Co.*, 168 F. 2d 812.

[28] § 5 of the Federal Employers' Liability Act, 35 Stat. 66, 45 U. S. C. § 55, provides: "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void . . . ."

[29] See H. R. Rep. No. 1386, 60th Cong., 1st Sess. 6. Compare *B. & O. S. R. Co.* v. *Voigt*, 176 U. S. 498

to be noted that in words it forbade exemption only from "liability." We said the right to select the "forum" even after the creation of a liability is a "substantial right" and that the agreement, restricting that choice, would thwart the express purpose of the statute. We need not and do not go so far in this present case. By the terms of the agreement to arbitrate, petitioner is restricted in his choice of forum prior to the existence of a controversy. While the Securities Act does not require petitioner to sue,[30] a waiver in advance of a controversy stands upon a different footing.[31]

Two policies, not easily reconcilable, are involved in this case. Congress has afforded participants in transactions subject to its legislative power an opportunity generally to secure prompt, economical and adequate solution of controversies through arbitration if the parties are willing to accept less certainty of legally correct adjustment.[32] On the other hand, it has enacted the Securities Act to protect the rights of investors and has forbidden a waiver of any of those rights. Recognizing the advantages that prior agreements for arbitration may provide for the solution of commercial controversies, we decide that the intention of Congress concerning the sale of securities is better carried out by holding invalid such an agreement for arbitration of issues arising under the Act.

Reversed.

MR. JUSTICE JACKSON, concurring.

I agree with the Court's opinion insofar as it construes the Securities Act to prohibit waiver of a judicial remedy in favor of arbitration by agreement made before any controversy arose. I think thereafter the parties could agree upon arbitration. However, I find it unnec-

[30] Cf. *Callen* v. *Pennsylvania R. Co.*, 332 U. S. 625, 631.

[31] *Brooklyn Savings Bank* v. *O'Neil*, 324 U. S. 697, 707, 714.

[32] Cf. *Wilko* v. *Swan*, 201 F. 2d, at 444.

essary in this case, where there has not been and could not be any arbitration, to decide that the Arbitration Act precludes any judicial remedy for the arbitrators' error of interpretation of a relevant statute.

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE MINTON joins, dissenting.

If arbitration inherently precluded full protection of the rights § 12 (2) of the Securities Act affords to a purchaser of securities, or if there were no effective means of ensuring judicial review of the legal basis of the arbitration, then, of course, an agreement to settle the controversy by arbitration would be barred by § 14, the anti-waiver provision, of that Act.

There is nothing in the record before us, nor in the facts of which we can take judicial notice, to indicate that the arbitral system as practiced in the City of New York, and as enforceable under the supervisory authority of the District Court for the Southern District of New York, would not afford the plaintiff the rights to which he is entitled.*

The impelling considerations that led to the enactment of the Federal Arbitration Act are the advantages of providing a speedier, more economical and more effec-

*Under the rules of the American Arbitration Association, available to the plaintiff under his contract, the procedure for selection of arbitrators is as follows:

The Association submits a list of potential arbitrators qualified by experience to adjudicate the particular controversy. In the City of New York, the list would be drawn from a panel of 4,400 persons, 1,275 of whom are lawyers. Each party may strike off the names of any unacceptable persons and number the remaining in order of preference. The Association then designates the arbitrators on the basis of the preferences expressed by both parties. See "Questions and Answers," Pamphlet of American Arbitration Association. In short, those who are charged to enforce the rights are selected by the parties themselves from among those qualified to decide.

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tive enforcement of rights by way of arbitration than can be had by the tortuous course of litigation, especially in the City of New York. These advantages should not be assumed to be denied in controversies like that before us arising under the Securities Act, in the absence of any showing that settlement by arbitration would jeopardize the rights of the plaintiff.

Arbitrators may not disregard the law. Specifically they are, as Chief Judge Swan pointed out, "bound to decide in accordance with the provisions of section 12 (2)." On this we are all agreed. It is suggested, however, that there is no effective way of assuring obedience by the arbitrators to the governing law. But since their failure to observe this law "would . . . constitute grounds for vacating the award pursuant to section 10 of the Federal Arbitration Act," 201 F. 2d 439, 445, appropriate means for judicial scrutiny must be implied, in the form of some record or opinion, however informal, whereby such compliance will appear, or want of it will upset the award.

We have not before us a case in which the record shows that the plaintiff in opening an account had no choice but to accept the arbitration stipulation, thereby making the stipulation an unconscionable and unenforceable provision in a business transaction. The Securities and Exchange Commission, as *amicus curiae*, does not contend that the stipulation which the Court of Appeals respected, under the appropriate safeguards defined by it, was a coercive practice by financial houses against customers incapable of self-protection. It is one thing to make out a case of overreaching as between parties bargaining not at arm's length. It is quite a different thing to find in the anti-waiver provision of the Securities Act a general limitation on the Federal Arbitration Act.

On the state of the record before us, I would affirm the decision of the Court of Appeals.

UNITED STATES *v.* FIVE GAMBLING DEVICES ETC.

NO. 14. APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE.*

Argued October 12, 1953.—Decided December 7, 1953.

The Act of January 2, 1951, forbids the interstate shipment of gambling devices, requires every dealer in gambling devices to register his places of business "in such district" with the Attorney General and report to him all sales and deliveries of gambling devices "in the district," and provides for the seizure and forfeiture of gambling devices possessed in violation of the Act. Certain dealers in gambling devices were indicted for violations of the registration and reporting requirements of the Act, without any allegation that the devices they sold had moved or would move in interstate commerce; and a libel to forfeit certain gambling devices was filed, without alleging that they ever were transported in or in any way affected interstate commerce. *Held:* Judgments dismissing the indictments and the libel are affirmed. Pp. 442–454.
Affirmed.

For opinion of MR. JUSTICE JACKSON, in which MR. JUSTICE FRANKFURTER and MR. JUSTICE MINTON join, see p. 442.

For opinion of MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, see p. 452.

For dissenting opinion of MR. JUSTICE CLARK, with whom THE CHIEF JUSTICE, MR. JUSTICE REED and MR. JUSTICE BURTON concur, see p. 454.

Acting Solicitor General Stern argued the cause for the United States. With him on the briefs were *Assistant Attorney General Olney, Beatrice Rosenberg* and *Carl H. Imlay. Solicitor General Cummings* was on the Statement as to Jurisdiction in No. 14; *Acting Solicitor General Stern* in Nos. 40 and 41.

*Together with No. 40, *United States* v. *Denmark*, and No. 41, *United States* v. *Braun*, on appeals from the United States District Court for the Southern District of Georgia.

Shelby Myrick argued the cause and filed a brief for appellees in Nos. 40 and 41. No appearance for appellee in No. 14.

MR. JUSTICE JACKSON announced the judgment of the Court and an opinion in which MR. JUSTICE FRANKFURTER and MR. JUSTICE MINTON join.

These cases present unsuccessful attempts, by two different procedures, to enforce the view of the Department of Justice as to construction of the Act of January 2, 1951,[1] which prohibits shipment of gambling machines in interstate commerce but includes incidental registration and reporting provisions. Two indictments charge Denmark and Braun severally with engaging in the business of dealing in gambling devices without registering with the Attorney General and reporting sales and deliveries. Both indictments were dismissed. The other proceeding is a libel to forfeit five gambling machines seized by Federal Bureau of Investigation agents from a country club in Tennessee. It also was dismissed.

The three cases, here on Government appeals, are similar in features which led to their dismissal and which raise constitutional issues. The indictments do not allege that the accused dealers, since the effective date of the Act or for that matter at any other time, have bought, sold or moved gambling devices in interstate commerce, or that the devices involved in their unreported sales have, since the effective date of the Act or at any other time, moved in interstate commerce or ever would do so. The libel does not show that the country club's machines were at any time transported in or in any way affect interstate commerce.

Section 2 of the Act prohibits transportation of gambling devices in interstate commerce except to any state

[1] 64 Stat. 1134, 15 U. S. C. (Supp. V) §§ 1171-1177.

which exempts itself or its subdivision by state law.[2] Section 3 requires every manufacturer and dealer in gambling devices annually to register his business and name and monthly to file detailed information as to each device sold and delivered during the preceding month.[3] Section

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[2] In pertinent part: "It shall be unlawful knowingly to transport any gambling device to any place in a State, the District of Columbia, or a possession of the United States from any place outside of such State, the District of Columbia, or possession: *Provided*, That this section shall not apply to transportation of any gambling device to a place in any State which has enacted a law providing for the exemption of such State from the provisions of this section, or to a place in any subdivision of a State if the State in which such subdivision is located has enacted a law providing for the exemption of such subdivision from the provisions of this section. . . ." 64 Stat. 1134, 15 U. S. C. (Supp. V) § 1172.

[3] "Upon first engaging in business, and thereafter on or before the 1st day of July of each year, every manufacturer of and dealer in gambling devices shall register with the Attorney General his name or trade name, the address of his principal place of business, and the addresses of his places of business in such district. On or before the last day of each month every manufacturer of and dealer in gambling devices shall file with the Attorney General an inventory and record of all sales and deliveries of gambling devices as of the close of the preceding calendar month for the place or places of business in the district. The monthly record of sales and deliveries of such gambling devices shall show the mark and number identifying each article together with the name and address of the buyer or consignee thereof and the name and address of the carrier. Duplicate bills or invoices, if complete in the foregoing respects, may be used in filing the record of sales and deliveries. For the purposes of this Act, every manufacturer or dealer shall mark and number each gambling device so that it is individually identifiable. In cases of sale, delivery, or shipment of gambling devices in unassembled form, the manufacturer or dealer shall separately mark and number the components of each gambling device with a common mark and number as if it were an assembled gambling device. It shall be unlawful for any manufacturer or dealer to sell, deliver, or ship any gambling device which is not marked and numbered for identification as herein provided; and it shall be unlawful for any manufacturer or dealer to

6 provides criminal penalties for failure to register or for violation of the transportation section,[4] and § 7 authorizes forfeiture of devices sold in violation of the Act.[5]

The information requirements are not expressly limited to persons engaged or transactions occurring in interstate commerce or conditioned on any connection therewith. Neither does the Act by any specific terms direct its application to transactions such as we have here.

Appellees contend, first, that the Act should not be construed to reach dealers, transactions or machines

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manufacture, recondition, repair, sell, deliver, or ship any gambling device without having registered as required by this section, or without filing monthly the required inventories and records of sales and deliveries." 64 Stat. 1135, 15 U. S. C. (Supp. V) § 1173.

[4] "Whoever violates any of the provisions of sections 2, 3, 4, or 5 of this Act shall be fined not more than $5,000 or imprisoned not more than two years, or both." 64 Stat. 1135, 15 U. S. C. (Supp. V) § 1176.

[5] "Any gambling device transported, delivered, shipped, manufactured, reconditioned, repaired, sold, disposed of, received, possessed, or used in violation of the provisions of this Act shall be seized and forfeited to the United States. All provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of vessels, vehicles, merchandise, and baggage for violation of the customs laws; the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from the sale thereof; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this Act, insofar as applicable and not inconsistent with the provisions hereof: *Provided*, That such duties as are imposed upon the collector of customs or any other person with respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the customs laws shall be performed with respect to seizures and forfeitures of gambling devices under this Act by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General." 64 Stat. 1135, 15 U. S. C. (Supp. V) § 1177.

unless shown to have some relation to interstate commerce; second, construed otherwise, the Act exceeds the power delegated to Congress under the Commerce Clause of the Constitution; third, the statute is unconstitutionally vague.

The Government answers, first, that the statute, literally read, reaches all dealers and transactions and the possession of all unreported devices without reference to interstate commerce; second, to make effective the prohibition of transportation in interstate commerce, Congress may constitutionally require reporting of all intrastate transactions; and, third, while Congress, by oversight, left an inappropriate and confusing phrase in the Act, the defect is not fatal inasmuch as the Attorney General has power to supplement the Act by regulations which will cure its indefiniteness.[8]

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[8] The ambiguity in the statute arose from the following facts: In the bill originally submitted to the Senate, S. 3357, § 3 began: ". . . every manufacturer of and dealer in gambling devices shall register with the *collector of internal revenue for each district in which such business is to be carried on*, his name [etc.] . . ." (Emphasis added.) See 96 Cong. Rec. 13649; Hearings before House Committee on Interstate and Foreign Commerce on S. 3357, 81st Cong., 2d Sess. 2. However, the Treasury Department wrote the House committee that since the bill did not concern the collection of revenue, the Justice Department should handle the registration of gambling devices. See H. R. Rep. No. 2769, 81st Cong., 2d Sess. 14; Hearings on S. 3357, *supra*, at 8–9. The House committee therefore deleted from the bill the language italicized above and substituted the words "Attorney General." See H. R. Rep. No. 2769, *supra*, at 8–9; 96 Cong. Rec. 13650, 14735, 15106, 15108, 16701. The deletion left without meaning the phrase "in such district," which appeared later in the section and which had previously referred back to the district in which the business was to be carried on.

The Attorney General attempted to clarify the ambiguity by issuing Department of Justice Order No. 4173, 28 CFR, 1952 Supp., § 3. He claimed authority to issue such a regulation under R. S. § 161, 5 U. S. C. § 22, which reads: "The head of each department is authorized to prescribe regulations, not inconsistent with law, for

We do not intimate any ultimate answer to the appellees' constitutional questions other than to observe that they cannot be dismissed as frivolous, nor as unimportant to the the nature of our federation. No precedent of this Court sustains the power of Congress to enact legislation penalizing failure to report information concerning acts not shown to be in, or mingled with, or found to affect commerce. The course of decision relied on by the Government on analysis falls short of the holding asked of us here. Indeed, we find no instance where Congress has attempted under the commerce power to impose reporting duties under penal sanction which would raise the question posed by these proceedings.[7] It is apparent

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the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it."

[7] Under the liquor law enforcement statutes, the offense was only complete when the unlabeled liquor was shipped in interstate commerce. *E. g.*, 35 Stat. 1137, as amended, 49 Stat. 1930, 18 U. S. C. § 390. See *Blumenthal* v. *United States*, 88 F. 2d 522, 524–525; *Arnold* v. *United States*, 115 F. 2d 523, 524. The marking and labeling section of the Ashurst-Sumners Act, 49 Stat. 494, 18 U. S. C. § 396c, specifically provided that prison-made goods must be marked "when shipped or transported in interstate or foreign commerce." See *Kentucky Whip & Collar Co.* v. *Illinois Central R. Co.*, 299 U. S. 334, 344, 352–353, where a suit for mandatory injunction under the Act alleged that the goods had been delivered in interstate commerce. A similar provision appeared in the subsequent statute. 62 Stat. 786, 18 U. S. C. (Supp. III) § 1762 (a). The Lacey Act of 1900, 31 Stat. 188, required packages containing dead animals to be plainly marked "when shipped by interstate commerce." See *Rupert* v. *United States*, 181 F. 87, 88, 91, where an indictment under the Act charged interstate shipments. The statute preventing passage of lottery tickets in interstate commerce, 62 Stat. 762, 18 U. S. C. (Supp. III) § 1301, contains no labeling, marking, or information requirements. Neither do the stolen property statutes. 62 Stat. 805, 806, 807, 63 Stat. 96, 18 U. S. C. (Supp. III) §§ 2311–2317.

that the Government's pleadings raise, and no doubt were intended to raise, a far-reaching question as to the extent of congressional power over matters internal to the individual states.

Of course, Congress possesses not only power to regulate commerce among the several states but also an inexact power "to make all laws which shall be necessary and proper for carrying into execution" its enumerated powers. In some instances Congress has left to an administrative body, such as the Interstate Commerce Commission or the National Labor Relations Board, the power to decide on a case-to-case basis whether the particular intrastate activity affects interstate commerce so as to warrant exercise of the power to reach into intrastate affairs.[8] Decisions under this type of legislation give the Government no support, for no such determination is required by this Act, and the Government asserts no such finding by anyone is necessary. In other statutes Congress has set up economic regulations which lay hold of activities in interstate commerce but also include intrastate activities so intermingled therewith that separa-

[8] Interstate Commerce Act, 36 Stat. 550, as amended, 41 Stat. 484, 49 U. S. C. § 13 (4), *Houston, E. & W. T. R. Co.* v. *United States*, 234 U. S. 342, 357–359; *Florida* v. *United States*, 282 U. S. 194; *North Carolina* v. *United States*, 325 U. S. 507, 511; *King* v. *United States*, 344 U. S. 254, 267–276. National Labor Relations Act, 49 Stat. 450, 452, 453, 454, 455, 29 U. S. C. §§ 152 (6), (7), 155, 160 (a), (e), (f), as amended, 61 Stat. 138, 140, 146, 147–148, 29 U. S. C. (Supp. III) §§ 152 (6), (7), 155, 160 (a), (e), (f), *Labor Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 31, 47; *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 49–50; *Newport News Shipbuilding & Dry Dock Co.* v. *Schauffler*, 303 U. S. 54, 57–58; *Santa Cruz Fruit Packing Co.* v. *Labor Board*, 303 U. S. 453, 466–468; *Consolidated Edison Co.* v. *Labor Board*, 305 U. S. 197, 223–224; *Labor Board* v. *Denver Building & Construction Trades Council*, 341 U. S. 675, 683–684.

tion is impractical or impossible.[9] Of course, decisions upholding legislation requiring information in aid of the taxing power [10] afford no support here, because the taxing power penetrates and permeates every activity, intrastate or interstate, within the Nation. While general statements, out of these different contexts, might bear upon the subject one way or another, it is apparent that the precise question tendered to us now is not settled by any prior decision.

The principle is old and deeply imbedded in our jurisprudence that this Court will construe a statute in a manner that requires decision of serious constitutional questions only if the statutory language leaves no reasonable alternative. *United States* v. *Rumely*, 345 U. S. 41. This is not because we would avoid or postpone

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[9] Hours of Service Acts (Railroads), 34 Stat. 1415, 45 U. S. C. §§ 61–64, *Baltimore & O. R. Co.* v. *I. C. C.*, 221 U. S. 612; Interstate Commerce Act, 34 Stat. 584, 49 U. S. C. § 1 *et seq.*, *Interstate Commerce Comm'n* v. *Goodrich Transit Co.*, 224 U. S. 194; Grain Futures Act, 42 Stat. 998, as amended, Commodity Exchange Act, 49 Stat. 1491, 7 U. S. C. § 1 *et seq.*, *Board of Trade of Chicago* v. *Olsen*, 262 U. S. 1; Ashurst-Sumners Act (Convict-Made Goods), 49 Stat. 494, 18 U. S. C. §§ 396b, 396c, *Kentucky Whip & Collar Co.* v. *Illinois Central R. Co.*, 299 U. S. 334; Tobacco Inspection Act, 49 Stat. 731, 7 U. S. C. §§ 511a–511q, *Currin* v. *Wallace*, 306 U. S. 1; Agricultural Adjustment Act of 1938, 52 Stat. 31, as amended, 7 U. S. C. § 1281 *et seq.*, *Mulford* v. *Smith*, 307 U. S. 38; as amended, 55 Stat. 203, 7 U. S. C. § 1340, *Wickard* v. *Filburn*, 317 U. S. 111; Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U. S. C. § 201 *et seq.*, *United States* v. *Darby*, 312 U. S. 100; *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186; Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, 7 U. S. C. § 608c, *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110; Federal Food, Drug, and Cosmetic Act, 52 Stat. 1040, 21 U. S. C. § 301 *et seq.*, *United States* v. *Walsh*, 331 U. S. 432; *United States* v. *Sullivan*, 332 U. S. 689.

[10] *United States* v. *Doremus*, 249 U. S. 86; *Nigro* v. *United States*, 276 U. S. 332; *Sonzinsky* v. *United States*, 300 U. S. 506; *United States* v. *Kahriger*, 345 U. S. 22.

difficult decisions. The predominant consideration is that we should be sure Congress has intentionally put its power in issue by the legislation in question before we undertake a pronouncement which may have far-reaching consequences upon the powers of the Congress or the powers reserved to the several states. To withhold passing upon an issue of power until we are certain it is knowingly precipitated will do no great injury, for Congress, once we have recognized the question, can make its purpose explicit and thereby necessitate or avoid decision of the question. Judicial abstention is especially wholesome where we are considering a penal statute. Our policy in constitutional cases is reinforced by the long tradition and sound reasons which admonish against enlargement of criminal statutes by interpretation.

This Court does and should accord a strong presumption of constitutionality to Acts of Congress. This is not a mere polite gesture. It is a deference due to deliberate judgment by constitutional majorities of the two Houses of Congress that an Act is within their delegated power or is necessary and proper to execution of that power. The rational and practical force of the presumption is at its maximum only when it appears that the precise point in issue here has been considered by Congress and has been explicitly and deliberately resolved.[11] But the presumption can have little realism when responsible congressional committees and leaders, in managing a bill, have told Congress that the bill will not reach that which the Act is invoked in this Court to cover.

We do not question that literal language of this Act is capable of the broad, unlimited construction urged by the Government. Indeed, if it were enacted for a

[11] Cf. *United States* v. *Bekins*, 304 U. S. 27, with *Ashton* v. *Cameron County Water Improvement District*, 298 U. S. 513.

unitary system of government, no other construction would be appropriate. But we must assume that the implications and limitations of our federal system constitute a major premise of all congressional legislation, though not repeatedly recited therein. Against the background of our tradition and system of government, we cannot say that the lower courts, which have held as a matter of statutory construction that this Act does not reach purely intrastate matters, have not made a permissible interpretation.[12] We find in the text no unmistakable intention of Congress to raise the constitutional questions implicit in the Government's effort to apply the Act in its most extreme impact upon affairs considered normally reserved to the states.

Judges differ as to the value of legislative history in statutory construction, but the Government often relies upon it to sustain its interpretation of statutes. However, in this case its reference to legislative history is conspicuously meager and unenlightening.[13] On the other hand, for what it is worth, appellees point out much that was reported by responsible committees and said by proponents of this antigambling-device legislation to indicate that Congress did not intend to raise the issues

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[12] *United States* v. *Denmark*, 119 F. Supp. 647; *United States* v. *Braun*, 119 F. Supp. 646; *United States* v. *Five Gambling Devices*, 119 F. Supp. 641; *United States* v. *15 Mills Blue Bell Gambling Machines*, 119 F. Supp. 74; *United States* v. *178 Gambling Devices*, 107 F. Supp. 394.

[13] The Government cites passages from the House Committee Report to the effect that slot machines and similar gambling devices are resulting in substantial revenues to Nation-wide crime syndicates. H. R. Rep. No. 2769, *supra*, at 4–6. The Government also refers to statements by a Congressman and the president of a company which manufactures gambling devices to the effect that these syndicates operate in every state in the Union and reap profits in the billions of dollars. Hearings on S. 3357, *supra*, at 10–12, 23, 28, 29, 182, 185, 191–192; 96 Cong. Rec. 13638.

here presented and was not aware it was doing so. For example, Senator Johnson, sponsor of the bill which eventually became this Act, declared that ". . . it keeps the Federal Government out of State and local police powers; no Federal official is going to become an enforcement officer in any State or locality." [14] The committee handling the bill reported: "On the other hand, the committee desires to emphasize that Federal law enforcement in the field of gambling cannot and should not be considered a substitute for State and local law enforcement in this field." [15] But here it was the Federal Bureau of Investigation which entered a country club and seized slot machines not shown ever to have had any connection with interstate commerce in any manner whatever. If this is not substituting federal for state enforcement, it is difficult to know how it could be accomplished. A more local and detailed act of enforcement is hardly conceivable. These cases, if sustained, would substantially take unto the Federal Government the entire pursuit of the gambling device.

No committee appears to have anticipated this, for the then Attorney General informed the committee, and it reported itself in agreement with the view, that "Actually enforcement against those people who gamble or use these machines wrongfully in the States is left with the States, and with the local officials, and there is absolutely no intention on the part of the Federal Government, express or otherwise, in this bill or anything that accompanies it, to get us into a prohibition era." [16] It is

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[14] 96 Cong. Rec. 15107. For similar statements by Senator Johnson, see 96 Cong. Rec. 15103, 15105.

[15] H. R. Rep. No. 2769, *supra*, at 5.

[16] *Ibid.* See also statements by Senator Ferguson, 96 Cong. Rec. 15104; and Representatives Rogers, 96 Cong. Rec. 13643–13644, 16853; Bryson, 96 Cong. Rec. 13649; Rees, 96 Cong. Rec. 13654, and Dolliver, 96 Cong. Rec. 13638.

impossible to reconcile statements of this kind, on which the Congress may have placed reliance, with the Government's present interpretation of the Act.

As we have indicated, the present indictments and libel are so framed as to apply in extreme form the most expansive interpretation of this Act. All that we would decide at present is a question of statutory construction. We think the Act does not have the explicitness necessary to sustain the pleadings which the Government has drafted in these cases. On this ground alone, we would affirm the judgments below.

Judgments affirmed.

Mr. Justice Black, with whom Mr. Justice Douglas joins, concurring.

I concur in the judgment, but regret my inability to agree with the reasons for affirmance expressed in the opinion of Mr. Justice Jackson. The language of § 3 of the Act on which the charges rest requires dealers to report "all sales and deliveries of gambling devices . . . ." No other language in the Act, and nothing in its legislative history, indicates to me that Congress was not here hitting at "all sales," including purely intrastate ones. In this situation I do not feel at liberty to read intrastate sales out of the Act, even if constitutional questions could thereby be avoided.*

Section 3 requires a gambling device dealer to register with the Attorney General "his name or trade name, the address of his principal place of business, and the ad-

*Holding that the Act requires reports of interstate sales would raise a serious constitutional question. The Act makes it a crime to transport gambling devices in interstate commerce. Consequently, requiring monthly reports of sales and deliveries made by an interstate dealer would require him to make monthly reports of his own crimes. The Fifth Amendment provides that no person shall be compelled "to be a witness against himself."

dresses of his places of business *in such district*." (Emphasis supplied.) Thereafter dealers must make detailed monthly reports of inventories, sales and deliveries for the "places of business" in the district. But the use of the phrase "such district" is bound to leave a dealer bewildered. Does the phrase refer to the place where a dealer is compelled to file his papers? Or does it simply force him to tell in what "district" he maintains "places"? If a dealer is able to solve this puzzle, how is he to find "such district"? The Act gives no hint as to where the "district" is or how a person can locate it. It never describes any "district." Yet failure to comply with these unascertainable requirements is punishable by fine up to $5,000, imprisonment up to two years, or both. This punishment, at least, is certain. I would apply the established rule that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally* v. *General Construction Co.*, 269 U. S. 385, 391.

Nor can a criminal statute too vague to be constitutionally valid be saved by additions made to it by the Attorney General. Of course, Congress could have prescribed that reports should be made at reasonably accessible places designated by the Attorney General. Cf. *United States* v. *Eaton*, 144 U. S. 677. But the Act under consideration did not do this. The Attorney General did promulgate an attempted clarifying regulation under the purported authority of R. S. § 161, 5 U. S. C. § 22. That statute provides no more than a general authorization to the heads of all departments to prescribe regulations governing their departments, officers, clerks, records, papers, etc. There is certainly not sufficient specificity in this grant concerning routine departmental business to support the Attorney General's attempt to

infuse life into an Act of Congress unenforceable for vagueness. The vital omission in this criminal statute can be supplied by the legislative branch of government, not by the Attorney General. I would affirm these judgments.

MR. JUSTICE CLARK, with whom THE CHIEF JUSTICE, MR. JUSTICE REED and MR. JUSTICE BURTON concur, dissenting.

I.

I agree with MR. JUSTICE BLACK on the question of statutory construction, that § 3 of the Act means just what it says: "every manufacturer of and dealer in gambling devices" is required to register with the Attorney General and file with him certain records, without reference to interstate commerce. MR. JUSTICE JACKSON'S opinion states that "this Court will construe a statute in a manner that requires decision of serious constitutional questions only if the statutory language leaves no reasonable alternative." I agree; but I think that the statutory language involved here leaves no reasonable alternative. It would be difficult for Congress to be more explicit than to direct the statute's mandate, as it has here, to "every" manufacturer and dealer without qualification. In *United States* v. *Sullivan*, 332 U. S. 689 (1948), the Court dealt with a highly analogous situation; the opinion of the Court there was that "A restrictive interpretation should not be given a statute merely because . . . giving effect to the express language employed by Congress might require a court to face a constitutional question." 332 U. S., at 693.

If by legislative history or otherwise it could persuasively be shown that Congress intended that the word "every" be given other than its plain meaning, we should likely consider such evidence in interpreting the statute.

See *Boston Sand Co.* v. *United States*, 278 U. S. 41, 48 (1928). But I think the legislative history on this issue is almost totally unenlightening.[1] Of the meager evidence available perhaps strongest support is furnished the construction resulting from a literal reading of the section. The bill, including the part of § 3 here in issue as passed without discussion, was drafted pursuant to the resolution of a "crime conference" consisting of leading national and local officials and others interested in law enforcement, in cooperation with the Department of Justice. The conference's unanimous resolution was "*Resolved*, That this conference endorse the idea of Federal legislation to prohibit the shipment of gambling devices into or out of any State where the possession or use of such devices is illegal. Further, *requiring Federal registration of all such machines sold within States.*"[2] The bill was drafted shortly thereafter by the Justice Department, with § 3 requiring registration and filing by "every" dealer and manufacturer. That part of the section was never changed and apparently was never discussed by Congress.

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[1] The quoted and cited statements of Senator Johnson occurred in the course of debate on the bill as a whole and particularly in reference to its ban on certain interstate shipments. Apparently the only mention of the scope of § 3 was the statement from the conference report that the bill "requires manufacturers and dealers in gambling devices to register annually with the Attorney General of the United States." 96 Cong. Rec. 15106. This statement occasioned no discussion. The Attorney General's statement that no "prohibition era" was contemplated and the committee report to the same effect apparently were designed to assure some Senators that the thrust of the Act was not at the gamblers, the users of the machines, who were to be left to state law enforcement measures and officials. However this may be, I suggest that the question of who was to enforce the various provisions of the Act—state officers or federal officers—is scarcely relevant to show congressional intent as to the scope of § 3.

[2] 96 Cong. Rec. 15102. (Emphasis supplied.)

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Concededly, to give the provision its literal meaning affords far more effective enforcement with respect to other sections of the Act than would be the case if any of the other suggested interpretations were applied.[2]

For these reasons I am unable to agree with the solution of these cases offered by MR. JUSTICE JACKSON.

II.

I am also unable to agree that the statute is unconstitutionally vague.

Section 3 requires that at specified times "every manufacturer of and dealer in gambling devices shall register with the Attorney General his name or trade name, the address of his principal place of business, and the addresses of his places of business in such district," and that there be filed monthly with the Attorney General "an inventory and record of all sales and deliveries of gambling devices as of the close of the preceding calendar month for the place or places of business in the district."

I do not mean to suggest that these provisions are models of clarity; when words are left in a statute by oversight, exemplary draftsmanship hardly results. But our function is not to discipline Congress for its failure to dot the i's and cross the t's. It is rather to make certain that the conduct required has been made sufficiently clear that to impose sanctions for ignoring the statute's requirements will not violate due process of law.

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[2] The construction urged by the appellees differs from that of MR. JUSTICE JACKSON. They state: ". . . the proper construction of this Act, we feel, is this: that all shipments of gambling devices in interstate commerce are prohibited except to those States where the same are legal. *Manufacturers or dealers shipping into those States where it is legal should be required to register* with the Attorney General and file an inventory." Brief of Appellees in Nos. 40 and 41, p. 8. (Emphasis supplied.) This construction would seem to circumvent the possible self-incrimination aspects suggested by MR. JUSTICE BLACK; it would also unduly strain statutory construction.

The appellees ask us to hold that this is a case "where patently ambiguous language is so unclear and equivocal as to render its enforcement a denial of due process"; they argue that conviction here violates the rule that "no one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes," and that all are entitled to be informed as to what the statute commands or forbids, citing *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453 (1939). In my view speculation is not here required, unless one seeks to avoid compliance with the law; I think that all who would comply with the law are sufficiently informed of what is required of them to assure that any bona fide attempt at compliance would be successful.

Appellees' complaint, according to their brief, appears to be not that the statute does not tell them what to file, but that it does not tell them where to file it. As I read the Act, several things are at once apparent: (1) the registrant must register with someone his name and the addresses of all his places of business, designating the principal one if he has more than one; (2) he must file monthly an inventory and record of all sales and deliveries of gambling devices; (3) this registration and filing must be done with the Attorney General—for the Act provides in clearest terms that he "shall register with the Attorney General his name" etc., and that he "shall file with the Attorney General an inventory" etc. I take it that, aside from 5 U. S. C. § 291 which provides that the Attorney General shall be at the seat of government, it is common knowledge that the Attorney General is located in Washington, D. C. There can be no doubt that the required information sent to him there would amount to compliance. If one desired to give meaning to "district," the Attorney General has United States Attorneys representing him throughout the country. There can be no doubt that the required information sent to the At-

torney General through a local United States Attorney would amount to compliance. At any rate the Act did not leave room for doubt that the Attorney General was to receive the specified information. Subsequent to passage of the Act the Attorney General, acting pursuant to 5 U. S. C. § 22, provided by regulation that the required information should be sent to him in Washington, with an exception made in the case of dealers and manufacturers in Illinois (apparently the center of the affected industry), who were directed to register and file with the United States District Attorney there. If there was ever bona fide doubt as to where to file the information, the Attorney General had now made his whereabouts for purposes of the Act crystal clear.

The Constitution requires that a statute must not be too vague to allow the citizen to ascertain what course of conduct he must follow to put himself safely within the bounds of the law. *Lanzetta* v. *New Jersey, supra.* No doubt the forgotten words in the Act provide room for quibbling; and the lawyer who is looking for litigation, or whose client seeks to avoid compliance with the law, can paint a picture of uncertainty and frustrated effort to fathom the unfathomable intent of Congress. But to me it is certain that, with or without the regulations, a person honestly seeking to comply with this law would inevitably have succeeded, without undue mental strain in determining the statute's import and without uncertainty as to his chances of remaining within the bounds of the law. The certainty required by the Due Process Clause is not tested from the would-be violator's standpoint; the test is rather whether adequate guidance is given to those who would be law-abiding. See *Musser* v. *Utah,* 333 U. S. 95, 97 (1948). The constitutional requirements are met when the statute prescribes a course of conduct which any person acting in good faith can recognize and act upon. The presence of the forgotten

words in this statute does not transform into a trap for the unwary the express requirements of registration and filing with the Attorney General specified information about one's person, business and places of business.

III.

The ultimate question presented by these cases is whether Congress has exceeded its constitutional power. I think it has not.

It appears that Congress in this Act has embarked on what it deemed the most effective course of action possible to eliminate one of the major sources of income to organized crime, while at the same time yielding to the policy of Nevada and a few other states where slot machines are legal and the underworld's control and profit are correspondingly minimized. The Act prohibits shipment of gambling devices into any state except those which act to exempt themselves from the statute. Section 3, which sets up the registration and filing requirements here in issue, was designed to make effective and enforceable the interstate shipment ban. It was thought that a report on each transfer of each machine before and after interstate shipment would enable enforcement officials to ascertain who transported the machine across state lines and thereby violated the law. Unless all such local sales were reported, it was thought that it would be an easy matter to conceal the identity of the interstate transporter by resorting to straw-man transactions, coverup intrastate "sales" before and after interstate shipment, and the like. In view of the established tie-up between slot machines and "Nation-wide crime syndicates," * more stringent methods of enforcement were deemed necessary to accomplish the ban on interstate

* H. R. Rep. No. 2769, 81st Cong., 2d Sess., pp. 4–6; S. Rep. No. 307, 82d Cong., 1st Sess., p. 55, published after passage of the Act, made this relationship even more clear.

transportation of the machines than would be needed to control an activity in which dealers and manufacturers could be presumed to be law-abiding citizens who kept accurate books and accounts. The net effect of these considerations is to clearly establish that the registration and filing requirements of the Act amount to reasonably necessary, appropriate, and probably essential means for enforcing the ban on interstate transportation of gambling devices.

The question presented, then, is whether Congress is empowered by the Constitution to require information, reasonably necessary and appropriate to make effective and enforceable a concededly valid ban on interstate transportation of gambling devices, from persons not shown to be themselves engaged in interstate activity. I think that an affirmative answer is not inevitably dictated by prior decisions of the Court; but, more important, no decision precludes an affirmative answer. The question has not been previously decided because the legislative scheme utilized here apparently has not been heretofore attempted. But its novelty should not suggest its unconstitutionality.

In the body of decisional law defining the scope of Congress' powers in regard to interstate commerce, it has been clearly established that activities local in nature may be *regulated* if they can fairly be said to "affect" commerce, or where local goods are commingled with goods destined for interstate commerce, or were previously in interstate commerce.[5] For present purposes, these cases at least

[5] *E. g., United States* v. *Darby*, 312 U. S. 100 (1941); *Wickard* v. *Filburn*, 317 U. S. 111 (1942); *Currin* v. *Wallace*, 306 U. S. 1 (1939); *United States* v. *Sullivan*, 332 U. S. 689 (1948). In *United States* v. *Darby*, *supra*, at 121, the Court summarized the power of Congress to control local activities as follows:

"Congress, having by the present Act adopted the policy of excluding from interstate commerce all goods produced for the commerce

establish that activities or goods intrastate in nature are not immune from congressional control where they are sufficiently related to interstate activities or goods controlled by Congress.

The Court also has on several occasions stated that the commerce power "extends to those activities intrastate which so affect interstate commerce *or the exercise of the power of Congress over it* as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce."[6] I think it may accurately be said that every sale of slot machines affects the exercise of the power of Congress over commerce, in view of the elusive

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which do not conform to the specified labor standards, it may choose the means reasonably adapted to the attainment of the permitted end, even though they involve control of intrastate activities. Such legislation has often been sustained with respect to powers, other than the commerce power granted to the national government, when the means chosen, although not themselves within the granted power, were nevertheless deemed appropriate aids to the accomplishment of some purpose within an admitted power of the national government. See *Jacob Ruppert, Inc.* v. *Caffey*, 251 U. S. 264; *Everard's Breweries* v. *Day*, 265 U. S. 545, 560; *Westfall* v. *United States*, 274 U. S. 256, 259. . . . Similarly Congress may require inspection and preventive treatment of all cattle in a disease infected area in order to prevent shipment in interstate commerce of some of the cattle without the treatment. *Thornton* v. *United States*, 271 U. S. 414. . . . And we have recently held that Congress in the exercise of its power to require inspection and grading of tobacco shipped in interstate commerce may compel such inspection and grading of all tobacco sold at local auction rooms from which a substantial part but not all of the tobacco sold is shipped in interstate commerce. *Currin* v. *Wallace* [306 U. S. 1], and see to the like effect *United States* v. *Rock Royal Co-op.* [307 U. S. 533]."

[6] *United States* v. *Darby*, *supra*, at 118; *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110, 119 (1942); *Wickard* v. *Filburn*, *supra*, at 124. (Emphasis supplied.)

nature of the object whose interstate shipment is being controlled.

The Constitution empowers Congress "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . . ." *McCulloch* v. *Maryland*, 4 Wheat. 316, 421 (1819), cited in the foregoing cases, interprets this as follows:

> "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

The Court in that case added that much leeway is to be given Congress in determining what means are appropriate. 4 Wheat., at 423.

In their brief appellees attack the power of Congress under the Constitution solely on the basis that the registration and filing requirements are not reasonable means of enforcing the provision against interstate transportation of slot machines. I believe that the reasonableness and the necessity of the requirements have already been adequately demonstrated. None of the cases relied on by the appellees suggests a contrary conclusion. The Act's requirements of registration and filing as to local transactions are certainly not a mere ruse designed to invade areas of control reserved to the states, but are "naturally and reasonably adapted to the effective exercise of" the commerce power.[7]

If Congress by § 3 had sought to *regulate* local activity, its power would no doubt be less clear. But here there is no attempt to regulate; all that is required is information in aid of enforcement of the conceded power to ban interstate transportation. The distinction is sub-

[7] Compare *Linder* v. *United States*, 268 U. S. 5, 17 (1925).

stantial. See *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194, 211 (1912).[8]

In my view Congress has power to require the information described in § 3 of the Act since the requirement is a means reasonably necessary to effectuate the prohibition of transporting gambling devices interstate. If it be suggested that such a holding would open possibilities for widespread congressional encroachment upon local activities whose regulation has been reserved to the states, I would point out, first, that power of *regulation* heretofore exclusively vested in the states remains there; and second, that the situation here is unique: the commodity involved is peculiarly tied to organized interstate crime and is itself illegal in the great majority of the states, and the federal law in issue was actively sought by local and state law enforcement officials as a means to assist them, not supplant them, in local law enforcement. I would *reverse* the judgments.[9]

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[8] Compare *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186 (1946), holding that Congress can empower the Administrator of the Fair Labor Standards Act to issue subpoenas *duces tecum* to obtain information from a corporation to determine whether it is covered by the Act or has violated it.

[9] Once it is established that Congress can require registration and filing, I view the forfeiture sanction imposed in No. 14 as an alternative method of enforcement, which presents no substantial additional issue. Compare *United States* v. *Stowell*, 133 U. S. 1 (1890).

NATIONAL LABOR RELATIONS BOARD *v.* LOCAL UNION NO. 1229, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 15. Argued October 12, 1953.—Decided December 7, 1953.

Upon the facts of this case, the discharge of certain employees by their employer did not constitute an unfair labor practice within the meaning of §§ 8 (a) (1) and 7 of the Taft-Hartley Act; their discharge was "for cause" within the meaning of § 10 (c) of that Act, and the action of the Labor Board in not requiring their reinstatement is here sustained. Pp. 465–478.

(a) In the circumstances of this case, in which the employer was an operator of a radio and television station, the distribution by the employees in question of handbills which made public a disparaging attack upon the quality of the employer's television broadcasts, but which had no discernible relation to a pending labor controversy, was adequate cause for the discharge of these employees. Pp. 467–477.

(b) The fortuity of the coexistence of a labor dispute affords these employees no substantial defense. Pp. 476–477.

(c) There is no occasion to remand this cause to the Board for further specificity of findings, for even if the employees' attack were treated as a concerted activity within § 7 of the Act, the means used by them in conducting the attack deprived them of the protection of that section, when read in the light and context of the purpose of the Act. Pp. 477–478.

91 U. S. App. D. C. 333, 202 F. 2d 186, set aside.

Upon review of an order of the National Labor Relations Board, 94 N. L. R. B. 1507, the Court of Appeals remanded the cause to the Board for further findings. 91 U. S. App. D. C. 333, 202 F. 2d 186. This Court granted certiorari. 345 U. S. 947. *Order of Court of Appeals set aside, and cause remanded to that court with instructions to dismiss*, p. 478.

Dominick L. Manoli argued the cause for petitioner. With him on the brief were *Acting Solicitor General Stern, Marvin E. Frankel, George J. Bott, David P. Findling* and *Samuel M. Singer.*

Louis Sherman argued the cause for respondent. With him on the brief was *Philip R. Collins.*

MR. JUSTICE BURTON delivered the opinion of the Court.

The issue before us is whether the discharge of certain employees by their employer constituted an unfair labor practice, within the meaning of §§ 8 (a)(1) and 7 of the Taft-Hartley Act,[1] justifying their reinstatement by the National Labor Relations Board. For the reason that their discharge was "for cause" within the meaning of § 10 (c) of that Act,[2] we sustain the Board in not requiring their reinstatement.

[1] "SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a)(3).

"SEC. 8. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 . . . ." National Labor Relations Act, as amended by the Labor Management Relations Act, 1947, 61 Stat. 140, 29 U. S. C. (Supp. V) §§ 157, 158 (a)(1).

[2] "SEC. 10. . . .

. . . . .

"(c) . . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease

In 1949, the Jefferson Standard Broadcasting Company (here called the company) was a North Carolina corporation engaged in interstate commerce. Under a license from the Federal Communications Commission, it operated, at Charlotte, North Carolina, a 50,000-watt radio station, with call letters WBT. It broadcast 10 to 12 hours daily by radio and television. The television service, which it started July 14, 1949, representing an investment of about $500,000, was the only such service in the area. Less than 50% of the station's programs originated in Charlotte. The others were piped in over leased wires, generally from New York, California or Illinois from several different networks. Its annual gross revenue from broadcasting operations exceeded $100,000 but its television enterprise caused it a monthly loss of about $10,000 during the first four months of that operation, including the period here involved. Its rates for television advertising were geared to the number of receiving sets in the area. Local dealers had large inventories of such sets ready to meet anticipated demands.

The company employed 22 technicians. In December 1948, negotiations to settle the terms of their employ-

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and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: . . . . If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. *No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. . . .*" (Emphasis supplied in last sentence.) 61 Stat. 146, 147, 29 U. S. C. (Supp. V) § 160 (c).

ment after January 31, 1949, were begun between representatives of the company and of the respondent Local Union No. 1229, International Brotherhood of Electrical Workers, American Federation of Labor (here called the union). The negotiations reached an impasse in January 1949, and the existing contract of employment expired January 31. The technicians, nevertheless, continued to work for the company and their collective-bargaining negotiations were resumed in July,[3] only to break down again July 8. The main point of disagreement arose from the union's demand for the renewal of a provision that all discharges from employment be subject to arbitration and the company's counterproposal that such arbitration be limited to the facts material to each discharge, leaving it to the company to determine whether those facts gave adequate cause for discharge.

July 9, 1949, the union began daily peaceful picketing of the company's station. Placards and handbills on the picket line charged the company with unfairness to its technicians and emphasized the company's refusal to renew the provision for arbitration of discharges. The placards and handbills named the union as the representative of the WBT technicians. The employees did not strike. They confined their respective tours of picketing to their off-duty hours and continued to draw full pay. There was no violence or threat of violence and no one has taken exception to any of the above conduct.

But on August 24, 1949, a new procedure made its appearance. Without warning, several of its technicians

[3] Pursuant to proceedings begun in October 1948, and to an election in May 1949, under the supervision of the Board, the union (by a vote of 12 to 2 of the 14 technicians participating) was chosen as the exclusive collective-bargaining representative of the company's technicians. May 9, 1949, the union was so certified by the Board. 94 N. L. R. B. 1507, 1529.

launched a vitriolic attack on the quality of the company's television broadcasts. Five thousand handbills were printed over the designation "WBT TECHNICIANS." These were distributed on the picket line, on the public square two or three blocks from the company's premises, in barber shops, restaurants and busses. Some were mailed to local businessmen. The handbills made no reference to the union, to a labor controversy or to collective bargaining. They read:

> "IS CHARLOTTE A SECOND-CLASS CITY?
>
> "You might think so from the kind of Television programs being presented by the Jefferson Standard Broadcasting Co. over WBTV. Have you seen one of their television programs lately? Did you know that all the programs presented over WBTV are on film and may be from one day to five years old. There are no local programs presented by WBTV. You cannot receive the local baseball games, football games or other local events because WBTV does not have the proper equipment to make these pickups. Cities like New York, Boston, Philadelphia, Washington receive such programs nightly. Why doesn't the Jefferson Standard Broadcasting Company purchase the needed equipment to bring you the same type of programs enjoyed by other leading American cities? Could it be that they consider Charlotte a second-class community and only entitled to the pictures now being presented to them?
>
> "WBT TECHNICIANS"

This attack continued until September 3, 1949, when the company discharged ten of its technicians, whom it charged with sponsoring or distributing these handbills.

The company's letter discharging them tells its side of the story.[4]

September 4, the union's picketing resumed its original tenor and, September 13, the union filed with the Board a charge that the company, by discharging the above-mentioned ten technicians, had engaged in an unfair labor practice. The General Counsel for the Board filed

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[4] "Dear Mr. . . . ,

"When you and some of our other technicians commenced early in July to picket against this Company, we felt that your action was very ill-considered. We were paying you a salary of . . . per week, to say nothing of other benefits which you receive as an employee of our Company, such as time-and-a-half pay for all work beyond eight hours in any one day, three weeks vacation each year with full pay, unlimited sick leave with full pay, liberal life insurance and hospitalization, for you and your family, and retirement and pension benefits unexcelled anywhere. Yet when we were unable to agree upon the terms of a contract with your Union, you began to denounce us publicly as 'unfair.'

"And ever since early July while you have been walking up and down the street with placards and literature attacking us, you have continued to hold your job and receive your pay and all the other benefits referred to above.

"Even when you began to put out propaganda which contained many untruths about our Company and great deal of personal abuse and slander, we still continued to treat you exactly as before. For it has been our understanding that under our labor laws, you have a very great latitude in trying to make the public believe that your employer is unfair to you.

"Now, however, you have turned from trying to persuade the public that we are unfair *to you* and are trying to persuade the public that we give inferior service *to them*. While we are struggling to expand into and develop a new field, and incidentally losing large sums of money in the process, you are busy trying to turn customers and the public against us in every possible way, even handing out leaflets on the public streets advertising that our operations are 'second-class,' and endeavoring in various ways to hamper and totally destroy our business. Certainly we are not required by law or common sense to keep you in our employment and pay you a

a complaint based on those charges and, after hearing, a trial examiner made detailed findings and a recommendation that all of those discharged be reinstated with back pay.[5] 94 N. L. R. B. 1507, 1527. The Board found that one of the discharged men had neither sponsored nor distributed the "Second-Class City" handbill and ordered his reinstatement with back pay. It then found that the other nine had sponsored or distributed the handbill and held that the company, by discharging them for such conduct, had not engaged in an unfair labor practice. The Board, accordingly, did not order their reinstatement. One member dissented. *Id.*, at 1507 *et seq.* Under § 10 (f) of the Taft-Hartley Act,[6] the union petitioned the Court of Appeals for the District of Columbia Circuit for a review of the Board's order and for such a modification of it as would reinstate all ten of the discharged technicians with back pay. That court remanded the cause to the Board for further consideration and for a finding as to the "unlawfulness" of the conduct of the employees which had led to their dis-

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substantial salary while you thus do your best to tear down and bankrupt our business.

"You are hereby discharged from our employment. Although there is nothing requiring us to do so, and the circumstances certainly do not call for our doing so, we are enclosing a check payable to your order for two weeks' advance or severance pay.

"Very truly yours,

"Jefferson Standard Broadcasting Company

"By: CHARLES H. CRUTCHFIELD

"Vice President

"Enclosure"

[5] Allegations based on the same facts and charging violations of § 8 (a) (3) and (5) of the Tart-Hartley Act do not require discussion here.

[6] 61 Stat. 148–149, 29 U. S. C. (Supp. V) § 160 (*f*).

charge. 91 U. S. App. D. C. 333, 202 F. 2d 186.[7] We granted certiorari because of the importance of the case in the administration of the Taft-Hartley Act. 345 U. S. 947.

In its essence, the issue is simple. It is whether these employees, whose contracts of employment had expired, were discharged "for cause." They were discharged solely because, at a critical time in the initiation of the company's television service, they sponsored or distributed 5,000 handbills making a sharp, public, disparaging attack upon the quality of the company's product and its business policies, in a manner reasonably calculated to harm the company's reputation and reduce its income. The attack was made by them expressly as "WBT TECHNICIANS." It continued ten days without indication of abatement. The Board found that—

> "It [the handbill] occasioned widespread comment in the community, and caused Respondent to apprehend a loss of advertising revenue due to dissatisfaction with its television broadcasting service.
>
> "In short, the employees in this case deliberately undertook to alienate their employer's customers by impugning the technical quality of his product. As

[7] The Court of Appeals said:

"Protection under § 7 of the Act . . . is withdrawn only from those concerted activities which contravene either (a) specific provisions or basic policies of the Act or of related federal statutes, or (b) specific rules of other federal or local law that is not incompatible with the Board's governing statute. . . .

. . . . . .

"We think the Board failed to make the finding essential to its conclusion that the concerted activity was unprotected. Sound practice in judicial review of administrative orders precludes this court from determining 'unlawfulness' without a prior consideration and finding by the Board." 91 U. S. App. D. C., at 335, 336, 202 F. 2d, at 188, 189.

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the Trial Examiner found, they did not misrepresent, at least wilfully, the facts they cited to support their disparaging report. And their ultimate purpose—to extract a concession from the employer with respect to the terms of their employment—was lawful. That purpose, however, was undisclosed; the employees purported to speak as experts, in the interest of consumers and the public at large. They did not indicate that they sought to secure any benefit for themselves, *as employees*, by casting discredit upon their employer." 94 N. L. R. B., at 1511.

The company's letter shows that it interpreted the handbill as a demonstration of such detrimental disloyalty as to provide "cause" for its refusal to continue in its employ the perpetrators of the attack. We agree.

Section 10 (c) of the Taft-Hartley Act expressly provides that "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause." [8] There is no more elemental cause for discharge of an employee than disloyalty to his employer. It is equally elemental that the Taft-Hartley Act seeks to strengthen, rather than to weaken, that cooperation, continuity of service and cordial contractual relation between employer and employee that is born of loyalty to their common enterprise.[9]

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[8] See note 2, *supra*.

[9] The Act's declaration of the policy says:

"SECTION 1. . . .

"(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one

Congress, while safeguarding, in § 7, the right of employees to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection," [10] did not weaken the underlying contractual bonds and loyalties of employer and employee. The conference report that led to the enactment of the law said:

> "[T]he courts have firmly established the rule that under the existing provisions of section 7 of the National Labor Relations Act, employees are not given any right to engage in unlawful or other improper conduct. . . .
>
> . . . . . .
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> ". . . Furthermore, in section 10 (c) of the amended act, as proposed in the conference agreement, it is specifically provided that no order of the Board shall require the reinstatement of any individual or the payment to him of any back pay if such individual was suspended or discharged for cause, and this, of course, applies with equal force whether or not the acts constituting the cause for

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another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

"It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce." 61 Stat. 136, 29 U. S. C. (Supp. V) § 141 (b).

[10] See note 1, *supra*.

discharge were committed in connection with a concerted activity." H. R. Rep. No. 510, 80th Cong., 1st Sess. 38–39.

This has been clear since the early days of the Wagner Act.[11] In 1937, Chief Justice Hughes, writing for the Court, said:

> "The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion." *Labor Board* v. *Jones & Laughlin*, 301 U. S. 1, 45–46. See also, *Labor Board* v. *Fansteel Corp.*, 306 U. S. 240, 252–258; *Auto. Workers* v. *Wisconsin Board*, 336 U. S. 245, 260–263.

Many cases reaching their final disposition in the Courts of Appeals furnish examples emphasizing the importance of enforcing industrial plant discipline and of maintaining loyalty as well as the rights of concerted activities. The courts have refused to reinstate employees discharged for "cause" consisting of insubordination, disobedience or disloyalty. In such cases, it often has been necessary to identify individual employees, somewhat comparable to the nine discharged in this case, and to recognize that their discharges were for causes which were separable from the concerted activities of others whose acts might come within the protection of § 7. It has been equally important to

[11] National Labor Relations Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. § 151 *et seq.*

identify employees, comparable to the tenth man in the instant case, who participated in simultaneous concerted activities for the purpose of collective bargaining or other mutual aid or protection but who refrained from joining the others in separable acts of insubordination, disobedience or disloyalty. In the latter instances, this sometimes led to a further inquiry to determine whether their concerted activities were carried on in such a manner as to come within the protection of § 7. See, *e. g.*, *Hoover Co.* v. *Labor Board*, 191 F. 2d 380; *Maryland Drydock Co.* v. *Labor Board*, 183 F. 2d 538; *Albrecht* v. *Labor Board*, 181 F. 2d 652; *Labor Board* v. *Kelco Corp.*, 178 F. 2d 578; *Joanna Cotton Mills Co.* v. *Labor Board*, 176 F. 2d 749; *Labor Board* v. *Reynolds Pen Co.*, 162 F. 2d 680; *Home Beneficial Life Ins. Co.* v. *Labor Board*, 159 F. 2d 280; *Labor Board* v. *Montgomery Ward & Co.*, 157 F. 2d 486; *Labor Board* v. *Draper Corp.*, 145 F. 2d 199; *Labor Board* v. *Aintree Corp.*, 135 F. 2d 395; *United Biscuit Co.* v. *Labor Board*, 128 F. 2d 771; *Labor Board* v. *Condenser Corp.*, 128 F. 2d 67; *Hazel-Atlas Glass Co.* v. *Labor Board*, 127 F. 2d 109; *Conn, Ltd.* v. *Labor Board*, 108 F. 2d 390.

The above cases illustrate the responsibility that falls upon the Board to find the facts material to such decisions. The legal principle that insubordination, disobedience or disloyalty is adequate cause for discharge is plain enough. The difficulty arises in determining whether, in fact, the discharges are made because of such a separable cause or because of some other concerted activities engaged in for the purpose of collective bargaining or other mutual aid or protection which may not be adequate cause for discharge. Cf. *Labor Board* v. *Peter Cailler Kohler Co.*, 130 F. 2d 503.

In the instant case the Board found that the company's discharge of the nine offenders resulted from their sponsoring and distributing the "Second-Class City" handbills

of August 24—September 3, issued in their name as the "WBT TECHNICIANS." Assuming that there had been no pending labor controversy, the conduct of the "WBT TECHNICIANS" from August 24 through September 3 unquestionably would have provided adequate cause for their disciplinary discharge within the meaning of § 10 (c). Their attack related itself to no labor practice of the company. It made no reference to wages, hours or working conditions. The policies attacked were those of finance and public relations for which management, not technicians, must be responsible. The attack asked for no public sympathy or support. It was a continuing attack, initiated while off duty, upon the very interests which the attackers were being paid to conserve and develop. Nothing could be further from the purpose of the Act than to require an employer to finance such activities. Nothing would contribute less to the Act's declared purpose of promoting industrial peace and stability.[12]

The fortuity of the coexistence of a labor dispute affords these technicians no substantial defense. While they were also union men and leaders in the labor controversy, they took pains to separate those categories. In contrast to their claims on the picket line as to the labor controversy, their handbill of August 24 omitted all reference to it. The handbill diverted attention from the labor controversy. It attacked public policies of the company which had no discernible relation to that controversy. The only connection between the handbill and

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[12] ". . . An employee can not work and strike at the same time. He can not continue in his employment and openly or secretly refuse to do his work. He can not collect wages for his employment, and, at the same time, engage in activities to injure or destroy his employer's business." *Hoover Co.* v. *Labor Board*, 191 F. 2d 380, 389, and see *Labor Board* v. *Montgomery Ward & Co.*, 157 F. 2d 486, 496; *United Biscuit Co.* v. *Labor Board*, 128 F. 2d 771.

the labor controversy was an ultimate and undisclosed purpose or motive on the part of some of the sponsors that, by the hoped-for financial pressure, the attack might extract from the company some future concession. A disclosure of that motive might have lost more public support for the employees than it would have gained, for it would have given the handbill more the character of coercion than of collective bargaining. Referring to the attack, the Board said "In our judgment, these tactics, in the circumstances of this case, were hardly less 'indefensible' than acts of physical sabotage." 94 N. L. R. B., at 1511. In any event, the findings of the Board effectively separate the attack from the labor controversy and treat it solely as one made by the company's technical experts upon the quality of the company's product. As such, it was as adequate a cause for the discharge of its sponsors as if the labor controversy had not been pending. The technicians, themselves, so handled their attack as thus to bring their discharge under § 10 (c).

The Board stated "We . . . do not decide whether the disparagement of product involved here would have justified the employer in discharging the employees responsible for it, had it been uttered in the context of a conventional appeal for support of the union in the labor dispute." *Id.*, at 1512, n. 18. This underscored the Board's factual conclusion that the attack of August 24 was not part of an appeal for support in the pending dispute. It was a concerted separable attack purporting to be made in the interest of the public rather than in that of the employees.

We find no occasion to remand this cause to the Board for further specificity of findings. Even if the attack were to be treated, as the Board has not treated it, as a concerted activity wholly or partly within the scope of those mentioned in § 7, the means used by the technicians in conducting the attack have deprived the attackers of

the protection of that section, when read in the light and context of the purpose of the Act.[13]

Accordingly, the order of the Court of Appeals remanding the cause to the National Labor Relations Board is set aside, and the cause is remanded to the Court of Appeals with instructions to dismiss respondent's petition to modify the order of the Board.

It is so ordered.

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS join, dissenting.

The issue before us is not whether this Court would have sustained the Board's order in this case had we been charged by Congress, as we could not have been, "with the normal and primary responsibility for granting or denying enforcement of Labor Board orders." *Labor Board* v. *Pittsburgh S. S. Co.*, 340 U. S. 498, 502. The issue is whether we should reverse the Court of Appeals, which is so charged, because that court withheld immediate decision on the Board's order and asked the Board for further light. That court found that the Board em-

[13] See *Labor Board* v. *Rockaway News Co.*, 345 U. S. 71 (discharge, for violation of an obligation to make deliveries, even though crossing a picket line, sustained); *Auto. Workers* v. *Wisconsin Board*, 336 U. S. 245, 255–263 (arbitrary unannounced interruptions of work, not protected by § 7); *Southern S. S. Co.* v. *Labor Board*, 316 U. S. 31 (discharge of seamen, for disobedience on shipboard while away from home port, sustained); *Allen-Bradley Local* v. *Wisconsin Board*, 315 U. S. 740 (mass picketing, unprotected); *Hotel Employees' Local* v. *Wisconsin Board*, 315 U. S. 437 (violence, while picketing, unprotected); *Labor Board* v. *Sands Manufacturing Co.*, 306 U. S. 332 (discharge, for repudiation of employee's agreement, sustained); *Labor Board* v. *Fansteel Corp.*, 306 U. S. 240 (discharge, for tortious conduct, violence or sit-down strike, sustained); and see *Associated Press* v. *Labor Board*, 301 U. S. 103, 132; *Labor Board* v. *Jones & Laughlin*, 301 U. S. 1, 45–46. See also, Cox, The Right to Engage in Concerted Activities, 26 Ind. L. J. 319 (1951); Recent Cases, 66 Harv. L. Rev. 1321 (1953).

ployed an improper standard as the basis for its decision. The Board judged the conduct in controversy by finding it "indefensible." The Court of Appeals held that by "giving 'indefensible' a vague content different from 'unlawful,' the Board misconceived the scope of the established rule." 91 U. S. App. D. C. 333, 335, 202 F. 2d 186, 188. Within "unlawful" that court included activities which "contravene . . . basic policies of the Act." The Court of Appeals remanded the case for the Board's judgment whether the conduct of the employees was protected by § 7 under what it deemed "the established rule."

On this central issue—whether the Court of Appeals rightly or wrongly found that the Board applied an improper criterion—this Court is silent. It does not support the Board in using "indefensible" as the legal litmus nor does it reject the Court of Appeals' rejection of that test. This Court presumably does not disagree with the assumption of the Court of Appeals that conduct may be "indefensible" in the colloquial meaning of that loose adjective, and yet be within the protection of § 7.

Instead, the Court, relying on § 10 (c) which permits discharges "for cause," points to the "disloyalty" of the employees and finds sufficient "cause" regardless of whether the handbill was a "concerted activity" within § 7. Section 10 (c) does not speak of discharge "for disloyalty." If Congress had so written that section, it would have overturned much of the law that had been developed by the Board and the courts in the twelve years preceding the Taft-Hartley Act. The legislative history makes clear that Congress had no such purpose but was rather expressing approval of the construction of "concerted activities" adopted by the Board and the courts.[1] Many of the legally recognized tactics and weapons of

[1] H. R. Rep. No. 245, 80th Cong., 1st Sess. 27–28; H. R. Rep. No. 510, 80th Cong., 1st Sess. 38–39.

labor would readily be condemned for "disloyalty" were they employed between man and man in friendly personal relations. In this connection it is significant that the ground now taken by the Court, insofar as it is derived from the provision of § 10 (c) relating to discharge "for cause," was not invoked by the Board in justification of its order.

To suggest that all actions which in the absence of a labor controversy might be "cause"—or, to use the words commonly found in labor agreements, "just cause"—for discharge should be unprotected, even when such actions were undertaken as "concerted activities, for the purpose of collective bargaining," is to misconstrue legislation designed to put labor on a fair footing with management. Furthermore, it would disregard the rough and tumble of strikes, in the course of which loose and even reckless language is properly discounted.

"Concerted activities" by employees and dismissal "for cause" by employers are not dissociated legal criteria under the Act. They are like the two halves of a pair of shears. Of course, as the Conference Report on the Taft-Hartley Act said, men on strike may be guilty of conduct "in connection with a concerted activity" which properly constitutes "cause" for dismissal and bars reinstatement.[2] But § 10 (c) does not obviate the necessity for a determination whether the distribution of the handbill here was a legitimate tool in a labor dispute or was so "improper," as the Conference Report put it, as to be denied the protection of § 7 and to constitute a discharge "for cause." It is for the Board, in the first instance, to make these evaluations, and a court of appeals does not travel beyond its proper bounds in asking the Board for greater explicitness in light of the correct legal standards for judgment.

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[2] H. R. Rep. No. 510, 80th Cong., 1st Sess. 39.

The Board and the courts of appeals will hardly find guidance for future cases from this Court's reversal of the Court of Appeals, beyond that which the specific facts of this case may afford. More than that, to float such imprecise notions as "discipline" and "loyalty" in the context of labor controversies, as the basis of the right to discharge, is to open the door wide to individual judgment by Board members and judges. One may anticipate that the Court's opinion will needlessly stimulate litigation.

Section 7 of course only protects "concerted activities" in the course of promoting legitimate interests of labor. But to treat the offensive handbills here as though they were circulated by the technicians as interloping outsiders to the sustained dispute between them and their employer is a very unreal way of looking at the circumstances of a labor controversy. Certainly there is nothing in the language of the Act or in the legislative history to indicate that only conventional placards and handbills, headed by a trite phrase such as "UNFAIR TO LABOR," are protected. In any event, on a remand the Board could properly be asked to leave no doubt whether the technicians, in distributing the handbills, were, so far as the public could tell, on a frolic of their own or whether this tactic, however unorthodox, was no more unlawful than other union behavior previously found to be entitled to protection.

It follows that the Court of Appeals should not be reversed.

HOWELL CHEVROLET CO. *v.* NATIONAL LABOR RELATIONS BOARD.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 34. Argued November 12, 1953.—Decided December 14, 1953.

On the facts in this case, the National Labor Relations Act *held* applicable to a local retail automobile dealer operating as an integral part of the manufacturer's national system of distribution. Pp. 482–484.

204 F. 2d 79, affirmed.

Erwin Lerten argued the cause for petitioner. With him on the brief was *Frederick A. Potruch.*

Marvin E. Frankel argued the cause for respondent. With him on the brief were *Acting Solicitor General Stern, George J. Bott, David P. Findling* and *Dominick L. Manoli.*

Opinion of the Court by MR. JUSTICE BLACK, announced by MR. JUSTICE REED.

The petitioner Howell Chevrolet Company retails Chevrolet automobiles and parts in Glendale, California. After hearings, the National Labor Relations Board found Howell guilty of unfair labor practices in refusing to bargain with its employees and intimidating them in various ways in violation of the National Labor Relations Act as amended.* An appropriate order was issued. 95 N. L. R. B. 410. The Court of Appeals for the Ninth Circuit enforced the Board's order, 204 F. 2d 79, rejecting the contention that the Act could not be applied to Howell. On similar facts the Sixth Circuit held that the Labor Board had no jurisdiction over a local Ford auto-

*61 Stat. 136, 29 U. S. C. (Supp. V) § 151 *et seq.*

mobile dealer. *Labor Board* v. *Bill Daniels, Inc.*, 202 F. 2d 579. We granted certiorari to consider the single question presented by petitioner—whether the Act is applicable to retail automobile dealers like Howell. 345 U. S. 955.

Sections 10 (a) and 2 (7) of the Labor Act empower the Board to prevent "any person" from adversely "affecting commerce" by unfair labor practices "tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." The Board found that Howell's unfair labor practices tended to do this. Among others, the following facts underlie that finding:

Howell bought its new Chevrolets from a General Motors assembly plant located in California and its spare parts and accessories were delivered to it from General Motors warehouses in California. Forty-three percent of all this merchandise was manufactured in other states and shipped into California for assembly or distribution. During 1949 Howell's purchases from General Motors exceeded $1,000,000.

Howell's local retail establishment was closely supervised by General Motors. Sweeping control of the business was reserved by General Motors in a "Direct Dealer Selling Agreement." Howell had to sign this agreement to get his "non-exclusive privilege of selling new Chevrolet motor vehicles and chassis" and "parts and accessories." The agreement required Howell to make varied and detailed reports about his business affairs, to devote full time to Chevrolet sales, to keep his sales facilities at a location and conduct the business in a manner that satisfied General Motors, to permit General Motors to inspect Howell's books, accounts, facilities, stocks and accessories and to keep such uniform accounting systems as General Motors might prescribe. Many other terms of the agency agreement also emphasized the interdependence of Howell's local and General Motors' national activities.

All this evidence caused the Board to conclude that Howell was "an integral part" of General Motors' national system of distribution. Under these circumstances the Board was justified in finding that Howell's repeated unfair labor practices tended to lead to disputes burdening or obstructing commerce among the states. It follows that the Board had jurisdiction to act under the facts it found.

Affirmed.

MR. JUSTICE DOUGLAS dissents.

Syllabus.

GARNER ET AL., TRADING AS CENTRAL STORAGE & TRANSFER CO., v. TEAMSTERS, CHAUFFEURS AND HELPERS LOCAL UNION NO. 776 (A. F. L.) ET AL.

CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, MIDDLE DISTRICT.

No. 56. Argued October 20–21, 1953.—Decided December 14, 1953.

Petitioners were engaged in Pennsylvania in an interstate trucking business. Only a small minority of its employees were members of respondent union. No labor dispute or strike was in progress, and petitioners had not objected to their employees joining the union. Respondents kept two pickets at petitioners' loading platform, to coerce petitioners into compelling or influencing their employees to join the union. The picketing was peaceful, but petitioners' business fell off 95% because employees of other carriers refused to cross the picket line. *Held:* Petitioners' grievance was within the jurisdiction of the National Labor Relations Board to prevent unfair labor practices under the Labor Management Relations Act, and was not subject to relief by injunction in the state courts. Pp. 486–491.

(a) The National Labor Relations Board was vested with power to entertain petitioners' grievance, to issue its own complaint against respondents, and, pending final hearing, to seek from a federal district court an injunction to prevent irreparable injury to petitioners. Pp. 488–491.

(b) The same considerations which prohibit federal courts from intervening in such cases, except by way of review or on application of the National Labor Relations Board, and which exclude state administrative bodies from assuming control of such matters, preclude state courts from doing so. Pp. 490–491.

(c) When federal power constitutionally is exerted for the protection of public or private interests, or both, it becomes the supreme law of the land and cannot be curtailed, circumvented or extended by a state procedure merely because such procedure will apply some doctrine of private right. Pp. 492–501.

(d) Congress, in enacting such legislation as the Labor Management Relations Act, can save alternative or supplemental state remedies by express terms, or by some clear implication, if it sees fit. P. 501.

373 Pa. 19, 94 A. 2d 893, affirmed.

James H. Booser argued the cause and filed a brief for petitioners.

Sidney G. Handler argued the cause for respondents. With him on the brief were *Edward Davis* and *Morris P. Glushien.*

Briefs of *amici curiae* urging affirmance were filed by *J. Albert Woll, Herbert S. Thatcher* and *James A. Glenn* for the American Federation of Labor; by *Arthur J. Goldberg* and *Thomas E. Harris* for the Congress of Industrial Organizations; and by *Acting Solicitor General Stern, George J. Bott, David P. Findling* and *Dominick L. Manoli* for the National Labor Relations Board.

MR. JUSTICE JACKSON delivered the opinion of the Court.

A decision of the Supreme Court of Pennsylvania has deprived petitioners of an injunction which a lower equity court of the State had granted to prohibit certain picketing by respondent labor union.[1] The court below reviewed the national Labor Management Relations Act and our applicable decisions, and concluded: "In our opinion such provisions for a comprehensive remedy precluded any State action by way of a different or additional remedy for the correction of the identical grievance." The correctness of this ruling is the sole issue here. We granted certiorari.[2]

Petitioners were engaged in the trucking business and had twenty-four employees, four of whom were members of respondent union. The trucking operations formed a link to an interstate railroad. No controversy, labor dispute or strike was in progress, and at no time had petitioners objected to their employees joining the union.

[1] 373 Pa. 19, 94 A. 2d 893. The equity court's opinion is reported at 62 Dauphin County Rep. 339.

[2] 345 U. S. 991.

Respondents, however, placed rotating pickets, two at a time, at petitioners' loading platform. None were employees of petitioners. They carried signs reading "Local 776 Teamsters Union (A. F. of L.) wants Employees of Central Storage & Transfer Co. to join them to gain union wages, hours and working conditions." Picketing was orderly and peaceful, but drivers for other carriers refused to cross this picket line and, as most of petitioners' interchange of freight was with unionized concerns, their business fell off as much as 95%. The courts below found that respondents' purpose in picketing was to coerce petitioners into compelling or influencing their employees to join the union.

The equity court held that respondents' conduct violated the Pennsylvania Labor Relations Act.[3] The Supreme Court of the Commonwealth held, quite correctly, we think, that petitioners' grievance fell within the jurisdiction of the National Labor Relations Board to prevent unfair labor practices. It therefore inferred that state remedies were precluded. The dissenting judge thought the federal remedy inadequate, as a practical matter, because the slow administrative processes of the National Labor Relations Board could not prevent imminent and irreparable damage to petitioners. Since our decisions have not specifically denied the power of state courts to enjoin such injury, he thought the injunction should be sustained.

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[3] The Pennsylvania statute does not specifically prohibit the type of union conduct charged in the complaint. However, the court reasoned that the union was attempting to force petitioners to violate § 6 (c) of the statute, which provides that "It shall be an unfair labor practice for an employer . . . . (c) By discrimination in regard to hire or tenure of employment, or any term or condition of employment to encourage or discourage membership in any labor organization . . . ." Pa. Laws 1937, 1172, Purdon's Pa. Stat. Ann., 1952, Tit. 43, § 211.6.

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The national Labor Management Relations Act, as we have before pointed out,[4] leaves much to the states, though Congress has refrained from telling us how much. We must spell out from conflicting indications of congressional will the area in which state action is still permissible.

This is not an instance of injurious conduct which the National Labor Relations Board is without express power to prevent and which therefore either is "governable by the State or it is entirely ungoverned." In such cases we have declined to find an implied exclusion of state powers. *International Union* v. *Wisconsin Board*, 336 U. S. 245, 254. Nor is this a case of mass picketing, threatening of employees, obstructing streets and highways, or picketing homes. We have held that the state still may exercise "its historic powers over such traditionally local matters as public safety and order and the use of streets and highways." *Allen-Bradley Local* v. *Wisconsin Board*, 315 U. S. 740, 749. Nothing suggests that the activity enjoined threatened a probable breach of the state's peace or would call for extraordinary police measures by state or city authority. Nor is there any suggestion that respondents' plea of federal jurisdiction and pre-emption was frivolous and dilatory, or that the federal Board would decline to exercise its powers once its jurisdiction was invoked.

Congress has taken in hand this particular type of controversy where it affects interstate commerce. In language almost identical to parts of the Pennsylvania statute, it has forbidden labor unions to exert certain types of coercion on employees through the medium of

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[4] *E. g., Algoma Plywood Co.* v. *Wisconsin Board*, 336 U. S. 301, 313; *Bethlehem Steel Co.* v. *New York Board*, 330 U. S. 767, 773; *Hill* v. *Florida ex rel. Watson*, 325 U. S. 538, 539 (and see concurring and dissenting opinions, pp. 544, 547); *Allen-Bradley Local* v. *Wisconsin Board*, 315 U. S. 740, 748–751.

the employer.[5] It is not necessary or appropriate for us to surmise how the National Labor Relations Board might have decided this controversy had petitioners presented it to that body. The power and duty of primary decision lies with the Board, not with us. But it is clear that the Board was vested with power to entertain petitioners' grievance, to issue its own complaint against respondents and, pending final hearing, to seek from the United States District Court an injunction to prevent irreparable injury to petitioners while their case was being considered.[6] The question then is whether the State, through its courts, may adjudge the same controversy and extend its own form of relief.

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[5] "It shall be an unfair labor practice for a labor organization or its agents— . . . (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership . . . ." § 8 (b), 61 Stat. 141, 29 U. S. C. (Supp. III) § 158 (b).

Subsection (a)(3) reads in part: "It shall be an unfair labor practice for an employer— . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ." 61 Stat. 140, 29 U. S. C. (Supp. III) § 158 (a).

[6] "The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States (including the District Court of the United States for the District of Columbia), within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper." § 10 (j), 61 Stat. 149, 29 U. S. C. (Supp. III) § 160 (j). Temporary injunc-

Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. Indeed, Pennsylvania passed a statute the same year as its labor relations Act reciting abuses of the injunction in labor litigations attributable more to procedure and usage than to substantive rules.[7] A multi-

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tions have been granted by the district courts upon application by the Board following issuance of complaints charging violations of § 8 (b) (2), *Brown* v. *National Union*, 104 F. Supp. 685; *Douds* v. *Anheuser-Busch, Inc.*, 99 F. Supp. 474; *Jaffee* v. *Newspaper & Mail Deliverers' Union*, 97 F. Supp. 443; *Penello* v. *International Union*, 88 F. Supp. 935, and of other sections of the Act. *Curry* v. *Union de Trabajadores de la Industria*, 86 F. Supp. 707; *Madden* v. *International Union*, 79 F. Supp. 616; *Douds* v. *Local 294*, 75 F. Supp. 414. See *Labor Board* v. *Denver Building & Construction Trades Council*, 341 U. S. 675, 682; *Herzog* v. *Parsons*, 86 U. S. App. D. C. 198, 203, 181 F. 2d 781, 786. See also 61 Stat. 155, 29 U. S. C. (Supp. V) § 178, granting similar initiative powers to the Attorney General when strikes or lockouts imperil the national health or safety.

[7] "(a) Under prevailing economic conditions developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and desig-

plicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law. The same reasoning which prohibits federal courts from intervening in such cases, except by way of review or on application of the federal Board, precludes state courts from doing so. Cf. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41; *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261. And the reasons for excluding state administrative bodies from assuming control of matters expressly placed within the competence of the federal Board also exclude state courts from like action. Cf. *Bethlehem Steel Co.* v. *New York Board*, 330 U. S. 767.

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nation of representatives of his own choosing to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint or coercion of employers of labor or their agents in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

"(b) Equity procedure that permits a complaining party to obtain sweeping injunctive relief that is not preceded by or conditioned upon notice to and hearing of the responding party or parties or that permits sweeping injunctions to issue after hearing based upon written affidavits alone and not wholly or in part upon examination, confrontation and cross-examination of witnesses in open court is peculiarly subject to abuse in labor litigation for the reasons that—

"(1) The status quo cannot be maintained, but is necessarily altered by the injunction.

"(2) Determination of issues of veracity and of probability of fact from affidavits of the opposing parties that are contradictory and under the circumstances untrustworthy rather than from oral examination in open court is subject to grave error.

"(3) Error in issuing the injunctive relief is usually irreparable to the opposing party; and

"(4) Delay incident to the normal course of appellate practice frequently makes ultimate correction of error in law or in fact unavailing in the particular case." Pa. Laws 1937, 1198, Purdon's Pa. Stat. Ann., 1952, Tit. 43, § 206b.

This case would warrant little further discussion except for a persuasively presented argument that the National Labor Relations Board enforces only a public right on behalf of the public interest, while state equity powers are invoked by a private party to protect a private right. The public right, it is said, is so distinct and dissimilar from the private right that federal occupancy of one field does not debar a state from continuing to exercise its conventional equity powers over the other. Support for this view is accumulated from the Act itself, its legislative history, some judicial expression, and professional commentary.[8]

It is true that the Act's preamble emphasizes the predominance of a public interest over private rights of either party to industrial strife, and declares its purpose to proscribe practices on the part of labor and management which are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.[9] And some language of the

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[8] Rose, The Labor Management Relations Act and the State's Power to Grant Relief, 39 Va. L. Rev. 765 (1953); Hall, The Taft-Hartley Act v. State Regulation, 1 Journal of Public Law 97 (1952).

[9] "Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

"It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe prac-

Act seems to contemplate a remedy to supplement, rather than to substitute for, existing ones."[10]

Also, the Senate Committee, reporting the bill, said:

> "After a careful consideration of the evidence and proposals before us, the committee has concluded that five specific practices by labor organizations and their agents, affecting commerce, should be defined as unfair labor practices. Because of the nature of certain of these practices, especially jurisdictional disputes, and secondary boycotts and strikes for specifically defined objectives, the committee is convinced that additional procedures must be made available under the National Labor Relations Act in order adequately to protect the public welfare which is inextricably involved in labor disputes.
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> ". . . Hence we have provided that the Board, acting in the public interest and not in vindication of purely private rights, may seek injunctive relief in the case of all types of unfair labor practices and that it shall also seek such relief in the case of strikes and boycotts defined as unfair labor practices . . . ."[11]

We are also reminded that this Court, in *Amalgamated Utility Workers* v. *Consolidated Edison Co., supra,* at 265, recognized this distinction by saying, "The Board as a public agency acting in the public interest, not any

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tices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce." § 1 (b), 61 Stat. 136, 29 U. S. C. (Supp. III) § 141 (b).

[10] ". . . This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . . ." § 10 (a), 61 Stat. 140, 29 U. S. C. (Supp. III) § 160 (a).

[11] S. Rep. No. 105, 80th Cong., 1st Sess. 8.

private person or group, not any employee or group of employees, is chosen as the instrument to assure protection from the described unfair conduct in order to remove obstructions to interstate commerce." [12] Various statements may also be cited in which the Board would appear to have recognized a distinction between public and private rights or interest in labor controversies.[13]

It often is convenient to describe particular claims as invoking public or private rights, and this handy classification is doubtless valid for some purposes. But usually the real significance and legal consequence of each term will depend upon its context and the nature of the interests it is invoked to distinguish.

Statutes may be called public because the rights conferred are of general application, while laws known as private affect few or selected individuals or localities.[14] Or public rights may mean those asserted by the state

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[12] Cf. *Republic Steel Corp.* v. *Labor Board*, 311 U. S. 7, 10: "The Act does not prescribe penalties or fines in vindication of public rights or provide indemnity against community losses as distinguished from the protection and compensation of employees."

[13] See, *e. g.*, Brief for the Board, pp. 14, 43, *Montgomery Building & Construction Trades Council* v. *Ledbetter Erection Co.*, 344 U. S. 178.

[14] See *Unity* v. *Burrage*, 103 U. S. 447. Blackstone noted that "the courts of law are bound to take notice judicially and *ex officio*" of public laws, as contrasted with private laws. 1 Commentaries (15th ed. 1809), 85. The Acts of Congress are classified in publication according to their public or private nature. Some state constitutions make special provisions for private or local bills. See Cloe and Marcus, Special and Local Legislation, 24 Ky. L. J. 351 (1936), for a tabulation of these provisions. The difference in classification is particularly striking in the field of divorce, which was formerly beset by private and local bills. See *Maynard* v. *Hill*, 125 U. S. 190. Many state constitutions now specifically prohibit private laws in the field of divorce. *E. g.*, Ala. Const., Art. 4, § 104 (1); Wyo. Const., Art. 3, § 27.

as a party either in criminal or civil proceedings.[15] Again, the body of learning we call conflict of laws elsewhere is called private international law because it is applied to adjustment of private interests, while public international law is applicable to the relations between states.[16] At other times, rights will be characterized by the body of law from which they are derived; but such distinction between public and private law is less sharp and significant in this country, where one system of law courts applies both, than in the Continental practice which administers public law through a system of courts separate from that which deals with private law questions.[17] Perhaps in this country the most usual differ-

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[15] Holland, Elements of Jurisprudence (6th ed. 1893), 112, declares this to be ". . . the radical distinction between Rights, and consequently between the departments of Law."

[16] Goodrich, Conflict of Laws (3d ed. 1949), §§ 1, 5; Cheshire, Private International Law (4th ed. 1952), 16.

[17] "Since the work of Dicey, the contrast between Continental systems, which distinguish between administrative law and private law and have a separate system of law Courts for each, and the Anglo-American system, which only knows one law and one system of law, is familiar to Anglo-American lawyers. No doubt at one time this gave expression to a profound diversity in the attitude taken by the two groups of legal systems towards the relations between authority and individual. . . . But it is commonplace today that this difference, so eloquently stated by Dicey, is in substance essentially a matter of the past, and that even in his own time it was only partly true. . . . There is today a vast body of administrative law both in Britain and the United States, but it has not yet been given a definite place in the legal system as has been done with administrative law in many Continental countries. . . . Such bodies as the British Broadcasting Corporation, the Agricultural Marketing Boards or, in the United States, the Interstate Commerce Commission, the National Labour Relations Board, the Federal Power Commission and hundreds of others are, in fact, bodies whose status is governed by public law and which would on the Continent come under administrative jurisdiction. . . ." Friedmann, Legal Theory (2d ed. 1949), 345.

entiation is between the legal rights or duties enforced through the administrative process and those left to enforcement on private initiative in the law courts.[18]

Federal law has largely developed and expanded as public law in this latter sense. It consists of substituting federal statute law applied by administrative procedures in the public interest in the place of individual suits in courts to enforce common-law doctrines of private right. This evolution, sharply contested, and presenting many problems, has taken place in many other fields as well as in labor law. For example, the common law recognized a shipper's right to have a common carrier transport his goods for reasonable rates, and the right was enforceable in the courts.[19] But this private right proved too costly and sporadic to be effective as trans-

[18] Pollock, A First Book of Jurisprudence (6th ed. 1929), 95–98, gives an illuminating discussion. He states in part: "Rules of private law may be said to have remained in a stage where all rules of law probably were in remote times: that is to say, the State provides judgment and justice, but only on the request and action of the individual citizen: those who desire judgment must come and ask for it. Accordingly the special field of such rules is that part of human affairs in which individual interests predominate, and are likely to be asserted on the whole with sufficient vigour, and moreover no public harm is an obvious or necessary consequence of parties not caring to assert their rights in particular cases. . . . There fall more specially under rules of public law the duties and powers of different authorities in the State, making up what is usually known as the law of the Constitution; also the special bodies of law governing the armed forces of the State, and the administration of its other departments; laws regulating particular trades and undertakings in the interest of public health or safety; and in short all State enterprise and all active interference of the State with the enterprises of private men. . . ." Pp. 96–97.

[19] 2 Kent, Commentaries (14th ed. 1896), *598–599; Story, Commentaries on the Law of Bailments (3d ed. 1843), §§ 508, 549; *Lough* v. *Outerbridge*, 143 N. Y. 271, 38 N. E. 292; *Chicago, B. & Q. R. Co.* v. *Jones*, 149 Ill. 361, 374, 37 N. E. 247, 250; see *Munn* v. *Illinois*, 94 U. S. 113, 133–134.

port became a vast enterprise. As to interstate commerce, this right was superseded by the Interstate Commerce Act, which, in the public interest, authorized a public tribunal to prescribe reasonable rates and to award reparations for excessive ones.[20] Of course, this put an end to private litigation in state and federal courts to determine, in the first instance, what rate for carriage is reasonable, although that Act did not expressly abolish the pre-existing private rights.[21]

Even if we were to accept as significant the distinction between public and private rights and regard the national Labor Management Relations Act as enforcing only public rights, the same reasoning would prevent us from assuming that the Pennsylvania labor statute declares rights of any different category. It is true that petitioners sought an injunction to restrain damage to their own business. But the injunction appears to have been granted because the picketing violated the state statute, and neither the statutory language nor the opinion of the Pennsylvania Supreme Court warrants a conclusion that the statute protects private rights, as most authorities would define the term. Passed in 1937, the statute recites that the growing inequality of bargaining power between employers and employees "substantially and adversely affects the general welfare of the State" and that certain practices tend to create "industrial strife and unrest, which are inimical to the public safety and welfare, and frequently endanger the public health." Encouragement of collective bargaining is declared "the public policy of the State." And one subsection reads: "This act shall be deemed an exercise of the police power

[20] §§ 11, 15, 16, 24 Stat. 383, 384; § 216, 49 Stat. 558, as amended, 49 U. S. C. §§ 11, 15, 16, 316.

[21] *Texas & P. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 443-444; *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U. S. 654, 661.

of the Commonwealth of Pennsylvania for the protection of the public welfare, prosperity, health, and peace of the people of the Commonwealth." [22]

This language is comparable, on the state level, to the language in the federal Act. If Congress was protecting a public, as opposed to a purely private, interest, the same could be said of the Pennsylvania Legislature. The State Supreme Court has not said otherwise.[23] The court opinion, of course, did not analyze in detail the state law basis for injunction in this case because it found lack of state jurisdiction, and the dissenting opinion discussed the jurisdictional aspect of the case and did not reach the merits. But we find no basis at all for petitioners' argument that the equity courts, which in Pennsylvania enforce the labor relations statute, would enforce rights of any different category, or of any less public or more private character, than those enforced by the National Labor Relations Board.

Further, even if we were to assume, with petitioners, that distinctly private rights were enforced by the state authorities, it does not follow that the state and federal authorities may supplement each other in cases of this type. The conflict lies in remedies, not rights. The same picketing may injure both public and private rights. But when two separate remedies are brought to bear on

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[22] §§ 2 (a), (c), (e), Pa. Laws 1937, 1169, 1170, Purdon's Pa. Stat. Ann., 1952, Tit. 43, §§ 211.2 (a), (c), (e).

[23] The same court has said of the Act in a different factual context: "It is inimical to the public interests, as declared in the preamble to our act, that those deprived of a particular employment, where such status is due to what is determined to be unlawful conduct on the part of the employer, should be deprived of compensation or wages when the employee by a reasonable effort could have secured employment which he was physically and mentally fitted to perform. If this rule is not followed the purposes of the act will not be fulfilled and the community will suffer." *W. T. Grant Co.* v. *United Retail Employees*, 347 Pa. 224, 226, 31 A. 2d 900, 901.

the same activity, a conflict is imminent. It must be remembered that petitioners' state remedy was a suit for an injunction prohibiting the picketing. The federal Board, if it should find a violation of the national Labor Management Relations Act, would issue a cease-and-desist order and perhaps obtain a temporary injunction to preserve the *status quo*. Or if it found no violation, it would dismiss the complaint, thereby sanctioning the picketing. To avoid facing a conflict between the state and federal remedies, we would have to assume either that both authorities will always agree as to whether the picketing should continue, or that the State's temporary injunction will be dissolved as soon as the federal Board acts.[24] But experience gives no assurance of either alternative, and there is no indication that the statute left it open for such conflicts to arise.

The detailed prescription of a procedure for restraint of specified types of picketing would seem to imply that other picketing is to be free of other methods and sources of restraint. For the policy of the national Labor Management Relations Act is not to condemn all picketing but only that ascertained by its prescribed processes to

[24] *International Union* v. *William D. Baker Co.*, 100 F. Supp. 773, illustrates the potentialities of conflict. A disagreement arose between a union and several contracting associations over a collective bargaining agreement. The agreement contained a no-strike provision. The union, contending that the agreement had come to an end, threatened to strike. The association obtained an injunction in the Pennsylvania courts restraining the members of the union from striking. The union prayed for an injunction in federal district court to prevent the associations from enforcing their state decree. The federal court held that, even if exclusive jurisdiction over the subject matter was in the federal courts, it had no power to enjoin enforcement of the state injunction. Whether this conclusion be correct or not (for a critical comment see Note, 48 Northwestern U. L. Rev. 383 (1953)), the case exemplifies the type of difficulty inherent in recognizing state supplemental relief in an otherwise exclusive federal field.

fall within its prohibitions. Otherwise, it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing. For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits.

Whatever purpose a classification of rights as public or private may serve, it is too unsettled and ambiguous to introduce into constitutional law as a dividing line between federal and state power or jurisdiction. Perhaps the clearest thing to emerge from the best-considered literature on this subject is that the two terms are not mutually exclusive, that the two classifications overlap,[25] and that they are of little help in cases such as we have here. In those cases where this Court has employed the term, it has been chiefly as an aid in statutory construction. Cf. *Federal Trade Commission* v. *Klesner*, 280 U. S. 19.

Our decisions dealing with injunctions have been much concerned with the existence and nature of private property rights, but no case is cited or recalled in which this Court has recognized the distinction between private and public rights to reach such consequences as are urged here. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41; *Frost* v. *Corporation Commission*, 278 U. S. 515; *Cavanaugh* v. *Looney*, 248 U. S. 453; *International News Service* v. *Associated Press*, 248 U. S. 215; *In re Debs*, 158 U. S. 564; *In re Sawyer*, 124 U. S. 200.

We conclude that when federal power constitutionally is exerted for the protection of public or private interests,

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[25] Pollock, n. 18, *supra*, at 99, says, "It will be seen, therefore, that the topics of public and private law are by no means mutually exclusive. On the contrary their application overlaps with regard to a large proportion of the whole mass of acts and events capable of having legal consequences."

or both, it becomes the supreme law of the land and cannot be curtailed, circumvented or extended by a state procedure merely because it will apply some doctrine of private right. To the extent that the private right may conflict with the public one, the former is superseded. To the extent that public interest is found to require official enforcement instead of private initiative, the latter will ordinarily be excluded. Of course, Congress, in enacting such legislation as we have here, can save alternative or supplemental state remedies by express terms, or by some clear implication, if it sees fit.

On the basis of the allegations, the petitioners could have presented this grievance to the National Labor Relations Board. The respondents were subject to being summoned before that body to justify their conduct. We think the grievance was not subject to litigation in the tribunals of the State.

Judgment affirmed.

UNITED STATES *v.* MORGAN.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 31. Argued October 19, 1953.—Decided January 4, 1954.

By a proceeding in the nature of *coram nobis*, respondent sought to have a Federal District Court set aside his conviction and sentence in that court for a federal crime, though he had served the full term for which he had been sentenced. He claimed that his conviction was invalid because of denial of his constitutional right to counsel at his trial. He had since been convicted in a state court of another crime, had been sentenced to a longer term as a second offender because of his prior federal conviction, and was still serving the state sentence. *Held:* Under the All-Writs Section, 28 U. S. C. § 1651 (a), the Federal District Court had power to issue a writ of error *coram nobis;* it had power to vacate its judgment of conviction and sentence; and respondent is entitled to an opportunity to show that his federal conviction was invalid. Pp. 503–513.

1. Though respondent's papers disclose some uncertainty as to his choice of a remedy, this Court treats them as adequately presenting a motion in the nature of a writ of error *coram nobis* enabling the trial court to properly exercise its jurisdiction. P. 505.

2. Issuance by a Federal District Court of a writ of error *coram nobis* is authorized by the All-Writs Section, 28 U. S. C. § 1651 (a); and power to issue the writ comprehends the power of the District Court to grant this motion in the nature of *coram nobis*. Pp. 506–510.

3. Such a motion is a step in the criminal case; and Rule 60 (b) of the Federal Rules of Civil Procedure, expressly abolishing the writ of error *coram nobis* in civil cases, is inapplicable. P. 505, n. 4.

4. Rule 35 of the Federal Rules of Criminal Procedure, allowing correction of "an illegal sentence at any time," is inapplicable. Pp. 505–506.

5. The provision of 28 U. S. C. § 2255 that a prisoner "in custody" may at any time move the court which imposed the sentence to vacate it, if "in violation of the Constitution or laws of the United States," does not supersede all other remedies in the nature of *coram nobis*. Pp. 510–511.

6. Continuation of litigation, after final judgment and after exhaustion or waiver of any statutory right of review, should be allowed through the extraordinary remedy of *coram nobis* only under circumstances compelling such action to achieve justice. P. 511.

7. Where it cannot be deduced from the record whether counsel was properly waived, where no other remedy is available, and where sound reasons exist for failure to seek appropriate earlier relief, a motion in the nature of a writ of *coram nobis* must be heard by the federal trial court. Pp. 511–512.

8. Since the results of the conviction may persist though the sentence has been served and the power to remedy an invalid sentence exists, respondent is entitled to an opportunity to attempt to show that his conviction was invalid. Pp. 512–513.

202 F. 2d 67, affirmed.

In respondent's proceeding in the nature of *coram nobis* to set aside his conviction and sentence, the Federal District Court denied relief. The Court of Appeals reversed. 202 F. 2d 67. This Court granted certiorari. 345 U. S. 974. *Affirmed*, p. 513.

Beatrice Rosenberg argued the cause for the United States. With her on the brief were *Acting Solicitor General Stern* and *Assistant Attorney General Olney*.

By special leave of Court, *pro hac vice*, *Jacob Abrams*, argued the cause for respondent. Respondent filed a brief *pro se*.

MR. JUSTICE REED delivered the opinion of the Court.

This review on certiorari requires us to decide whether a United States District Court has power to vacate its judgment of conviction and sentence after the expiration of the full term of service.

On December 18, 1939, respondent pleaded guilty on a federal charge, in the Northern District of New York, and was given a four-year sentence which he served. Thereafter, in 1950, he was convicted by a New York

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court on a state charge, sentenced to a longer term as a second offender because of the prior federal conviction,[1] and is now incarcerated in a state prison.

As courts of New York State will not review the judgments of other jurisdictions on habeas corpus or *coram nobis*, *People* v. *McCullough*, 300 N. Y. 107, 110, 89 N. E. 2d 335, 336–337, respondent filed an application for a writ of error *coram nobis* and gave notice of a motion for the writ in the United States District Court where his first sentence was received. Both sought an order voiding the judgment of conviction. The ground was violation of his constitutional rights through failure, without his competent waiver, to furnish him counsel. *Johnson* v. *Zerbst*, 304 U. S. 458. The District Court in an unreported decision treated the proceeding as a motion under 28 U. S. C. § 2255 [2] and refused relief because it had no jurisdiction as the applicant was no longer in custody under its sentence, citing *United States* v. *Lavelle*, 194 F. 2d 202, a controlling authority on that point. On appeal, the Court of Appeals reversed. It held that 28 U. S. C. § 2255 did not supersede "all other remedies which could be invoked in the nature of the common law writ of error *coram nobis*." As it considered that the remedy sought was of that kind and the application justified a hearing because the error alleged was "of fundamental character," the Court of Appeals reversed and, without passing upon

[1] New York Penal Law, § 1941.

[2] 28 U. S. C. § 2255:

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence."

the sufficiency of the allegations, directed remand for further proceedings. *United States* v. *Morgan*, 202 F. 2d 67. Deeming the decision to conflict with *United States* v. *Kerschman*, 201 F. 2d 682, we granted certiorari. 345 U. S. 974.

The foregoing summary of steps discloses respondent's uncertainty in respect to choice of remedy. The papers are labeled as though they sought a common-law writ of error *coram nobis* but the notice of the motion indicates that an order voiding the judgment is sought. In behalf of the unfortunates, federal courts should act in doing justice if the record makes plain a right to relief.[3] We think a belated effort to set aside the conviction and sentence in the federal criminal case is shown. We therefore treat the record as adequately presenting a motion in the nature of a writ of error *coram nobis* enabling the trial court to properly exercise its jurisdiction. *Adams* v. *McCann*, 317 U. S. 269, 272.[4] So treating the motion,

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[3] *Darr* v. *Burford*, 339 U. S. 200, 203-204:

"The writ of habeas corpus commands general recognition as the essential remedy to safeguard a citizen against imprisonment by State or Nation in violation of his constitutional rights. To make this protection effective for unlettered prisoners without friends or funds, federal courts have long disregarded legalistic requirements in examining applications for the writ and judged the papers by the simple statutory test of whether facts are alleged that entitle the applicant to relief."

[4] Such a motion is a step in the criminal case and not, like habeas corpus where relief is sought in a separate case and record, the beginning of a separate civil proceeding. *Kurtz* v. *Moffitt*, 115 U. S. 487, 494. While at common law the writ of error *coram nobis* was issued out of chancery like other writs, Stephens, Principles of Pleading (3d Amer. ed.), 142, the procedure by motion in the case is now the accepted American practice. *Pickett's Heirs* v. *Legerwood*, 7 Pet. 144, 147; *Wetmore* v. *Karrick*, 205 U. S. 141, 151; *United States* v. *Mayer*, 235 U. S. 55, 67. As it is such a step, we do not think that Rule 60 (b), Fed. Rules Civ. Proc., expressly abolishing the

Rule 35, Fed. Rules Crim. Proc., allowing the correction of "an illegal sentence at any time" is inapplicable. Sentences subject to correction under that rule are those that the judgment of conviction did not authorize.[5]

Since this motion in the nature of the ancient writ of *coram nobis* is not specifically authorized by any statute enacted by Congress, the power to grant such relief, if it exists, must come from the all-writs section of the Judicial Code.[6] This section originated in the Judiciary Act of 1789[7] and its substance persisted through the Revised Statutes, § 716, and the Judicial Code, § 262, to its present form upholding the judicial power to attain justice for suitors through procedural forms "agreeable to the usages and principles of law."[8] If there is power granted to

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writ of error *coram nobis* in civil cases, applies. This motion is of the same general character as one under 28 U. S. C. § 2255. See Reviser's Note. Cf. *United States* v. *Kerschman*, 201 F. 2d 682, 684. And see contra to the above note, *People* v. *Kemnetz*, 296 Ill. App. 119, 15 N. E. 2d 883.

[5] *United States* v. *Bradford*, 194 F. 2d 197, 201; see also *Tinder* v. *United States*, 345 U. S. 565.

[6] 28 U. S. C. § 1651 (a): "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

Reviser's Note:

"The revised section extends the power to issue writs in aid of jurisdiction, to all courts established by Act of Congress, thus making explicit the right to exercise powers implied from the creation of such courts."

[7] 1 Stat. 81–82:

"That all the before-mentioned courts of the United States, shall have power to issue writs of *scire facias, habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. . . ."

[8] See *United States Alkali Assn.* v. *United States*, 325 U. S. 196, 201; cf. *United States* v. *Beatty*, 232 U. S. 463, 467.

issue writs of *coram nobis* by the all-writs section, we hold it would comprehend the power for the District Court to take cognizance of this motion in the nature of a *coram nobis*. See note 4, *supra*. To move by motion instead of by writ is purely procedural. The question then is whether the all-writs section gives federal courts power to employ *coram nobis*.

The writ of *coram nobis* was available at common law to correct errors of fact.[9] It was allowed without limitation of time for facts that affect the "validity and regularity" of the judgment,[10] and was used in both civil and criminal cases.[11] While the occasions for its use were infrequent, no one doubts its availability at common law.[12] *Coram nobis* has had a continuous although limited use also in our states.[13] Although the scope of the

[9] 2 Tidd's Practice (4th Amer. ed.) 1130–1137:
"If a judgment in the King's Bench be erroneous in matter of *fact* only, and not in point of law, it may be reversed in the *same* court, by writ of error *coram nobis*, or *quae coram nobis resident*; so called, from its being founded on the record and process, which are stated in the writ to remain in the court of the lord the king, before the king himself; as where the defendant, being under age, appeared by attorney, or the plaintiff or defendant was a married woman at the time of commencing the suit, or died before verdict, or interlocutory judgment: for error in fact is not the error of the judges, and reversing it is not reversing their own judgment. So, upon a judgment in the King's Bench, if there be error in the *process*, or through the default of the *clerks*, it may be reversed in the same court, by writ of error *coram nobis*: . . . ."

[10] Stephens, Principles of Pleading (3d Amer. ed.), 143; 2 Bishop, New Criminal Procedure (2d ed.), 1181.

[11] See citations in n. 10, and *United States* v. *Plumer*, 27 Fed. Cas. 561, 572, Mr Justice Clifford; *O'Connell* v. *The Queen*, 11 Cl. & Fin. (H. L. Rep.) 155, 233, 252.

[12] Archbold (7th ed., Chitty, 1840) 350, 389; 1 Holdsworth, History of English Law (1927), 224.

[13] A collection of these cases appears in an article by Abraham L. Freedman, Esq., 3 Temple L. Q. 365, 372. See *Bronson* v. *Schulten*, 104 U. S. 410, 416.

remedy at common law is often described by references to the instances specified by Tidd's Practice, see note 9, *supra*, its use has been by no means so limited. The House of Lords in 1844 took cognizance of an objection through the writ based on a failure properly to swear witnesses. See the *O'Connell* case, note 11, *supra*. It has been used, in the United States, with and without statutory authority but always with reference to its common-law scope—for example, to inquire as to the imprisonment of a slave not subject to imprisonment, insanity of a defendant, a conviction on a guilty plea through the coercion of fear of mob violence, failure to advise of right to counsel.[14] An interesting instance of the use of *coram nobis* by the Court of Errors of New York is found in *Davis* v. *Packard*, 8 Pet. 312. It was used by the Court of Errors, and approved by this Court, to correct an error "of fact not apparent on the face of the record" in the trial court, to wit, the fact that Mr. Davis was consul-general of the King of Saxony and therefore exempt from suit in the state court.

This Court discussed the applicability of a motion in federal courts in the nature of *coram nobis* in *United States* v. *Mayer*, 235 U. S. 55, 67. There a convicted defendant alleged he discovered through no fault of his, only after the end of the term in which he was convicted, misconduct of an assistant United States attorney and concealed bias of a juror against him, the defendant.

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[14] *Ex parte Toney*, 11 Mo. 661; *Adler* v. *State*, 35 Ark. 517; *Sanders* v. *State*, 85 Ind. 318; *Matter of Hogan* v. *Court*, 296 N. Y. 1, 9, 68 N. E. 2d 849, 852–853. See also a discussion of the New York cases by Judge Stanley H. Fuld, The Writ of Error Coram Nobis, 117 New York L. J. 2212, 2230, 2248, issues of June 5, 6, 7, 1947; Note, 34 Cornell L. Q. 596. *Spence* v. *Dowd*, 145 F. 2d 451; cf. *Hysler* v. *Florida*, 315 U. S. 411; *Taylor* v. *Alabama*, 335 U. S. 252; *People* v. *Green*, 355 Ill. 468, 189 N. E. 500.

This Court refused to direct consideration of the motion after the term expired because the remedy, if any, was by writ of error or motion for new trial. As it was not applicable in the circumstances of the *Mayer* case, this Court refused to say whether a motion *coram nobis* would ever lie in federal courts.[15] This Court has approved correction of clerical errors after the term. *Wetmore* v. *Karrick*, 205 U. S. 141, 154. However, we have not held that the writ of *coram nobis* or a motion of that nature was available in the federal courts.

In other federal courts than ours, there has been a difference of opinion as to the availability of the remedy. Chief Justice Marshall in *Strode* v. *The Stafford Justices*, 1 Brock. 162, 23 Fed. Cas. 236, overruled an objection to a writ of error *coram nobis* to set aside a fourteen-year-old judgment because of the death of one party prior to its rendition. In explication, the Chief Justice pointed out that the Judiciary Act of 1789, 1 Stat. 84, § 22, limited to five years the bringing of any writ of error and forbade it "for any error in fact." In allowing the *coram nobis*, he held that the section showed the writ of error

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[15] ". . . and even if it be assumed that in the case of errors in certain matters of fact, the district courts may exercise in criminal cases—as an incident to their powers expressly granted—a correctional jurisdiction at subsequent terms analogous to that exercised at common law on writs of error *coram nobis* (See Bishop, New Crim. Pro., 2d ed., § 1369), as to which we express no opinion, that authority would not reach the present case. This jurisdiction was of limited scope; the power of the court thus to vacate its judgments for errors of fact existed, as already stated, in those cases where the errors were of the most fundamental character, that is, such as rendered the proceeding itself irregular and invalid." *Id.*, p. 69. See also *Bronson* v. *Schulten*, 104 U. S. 410, 416; *Phillips* v. *Negley*, 117 U. S. 665, 673.

In *United States* v. *Smith*, 331 U. S. 469, 475, note 4, we referred to the slight need for a remedy like *coram nobis* in view of the modern substitutes.

referred to was a writ on appeal and therefore the error in fact could not be examined except by *coram nobis*. The Courts of Appeals for the Sixth and Ninth Circuits have held the motion available for claims of insanity.[16] The Third and Fourth Circuits have made similar rulings in cases similar to this.[17] The Fifth Circuit remanded for inquiry into a movant's allegation upon a similar motion that witnesses against him had been coerced by officers to commit perjury in testifying against him.[18] In many other cases federal courts have taken cognizance of motions in the nature of *coram nobis* but denied them because the circumstances did not make *coram nobis* available.[19] There are few cases where the power to consider a motion for *coram nobis* relief has been denied.[20]

The contention is made that § 2255 of Title 28, U. S. C., providing that a prisoner "in custody" may at any time move the court which imposed the sentence to vacate it, if "in violation of the Constitution or laws of the United States," should be construed to cover the entire field of remedies in the nature of *coram nobis* in federal courts. We see no compelling reason to reach that conclusion.

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[16] *Allen* v. *United States*, 162 F. 2d 193; *Robinson* v. *Johnston*, 118 F. 2d 998, 1001, vacated and remanded for further proceedings, 316 U. S. 649.

[17] *Roberts* v. *United States*, 158 F. 2d 150; *United States* v. *Steese*, 144 F. 2d 439. See also *United States* v. *Monjar*, 64 F. Supp. 746.

[18] *Garrison* v. *United States*, 154 F. 2d 106; cf. *Pierce* v. *United States*, 157 F. 2d 848.

[19] *Tinkoff* v. *United States*, 129 F. 2d 21; *Barber* v. *United States*, 142 F. 2d 805; *Spaulding* v. *United States*, 155 F. 2d 919; *United States* v. *Moore*, 166 F. 2d 102; *Crowe* v. *United States*, 169 F. 2d 1022; *Bice* v. *United States*, 177 F. 2d 843; *United States* v. *Rockower*, 171 F. 2d 423; *Farnsworth* v. *United States*, 91 U. S. App. D. C. 121, 198 F. 2d 600. Cf. *Strang* v. *United States*, 53 F. 2d 820.

[20] *United States* v. *Kerschman*, 201 F. 2d 682; *Gilmore* v. *United States*, 129 F. 2d 199.

In *United States* v. *Hayman*, 342 U. S. 205, 219, we stated the purpose of § 2255 was "to meet practical difficulties" in the administration of federal habeas corpus jurisdiction. We added: "Nowhere in the history of Section 2255 do we find any purpose to impinge upon prisoners' rights of collateral attack upon their convictions." We know of nothing in the legislative history that indicates a different conclusion. We do not think that the enactment of § 2255 is a bar to this motion, and we hold that the District Court has power to grant such a motion.

Continuation of litigation after final judgment and exhaustion or waiver of any statutory right of review should be allowed through this extraordinary remedy only under circumstances compelling such action to achieve justice. There are suggestions in the Government's brief that the facts that justify *coram nobis* procedure must have been unknown to the judge. Since respondent's youth and lack of counsel were so known, it is argued, the remedy of *coram nobis* is unavailable. One finds similar statements as to the knowledge of the judge occasionally in the literature and cases of *coram nobis*.[21] Such an attitude may reflect the rule that deliberate failure to use a known remedy at the time of trial may be a bar to subsequent reliance on the defaulted right.[22] The trial record apparently shows Morgan was without counsel. *United States* v. *Morgan*, 202 F. 2d 67, 69. He alleges he was nineteen, without knowledge of law and not advised as to his rights. The record is barren of the reasons that brought about a trial without

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[21] 56 Yale L. J. 197, 233; 34 Cornell L. Q. 598; *Robinson* v. *Johnston*, 118 F. 2d 998, 1001, vacated and remanded for further proceedings, 316 U. S. 649.

[22] *Brown* v. *Allen*, 344 U. S. 443, 486; see *Gayes* v. *New York*, 332 U. S. 145, 149, note 3; note, 58 A. L. R. 1286.

legal representation for the accused.[23] As the plea was "guilty" no details of the hearing appear. Cf. *De Meerleer* v. *Michigan*, 329 U. S. 663. In this state of the record we cannot know the facts and thus we must rely on respondent's allegations.

In the *Mayer* case this Court said that *coram nobis* included errors "of the most fundamental character."[24] Under the rule of *Johnson* v. *Zerbst*, 304 U. S. 458, 468, decided prior to respondent's conviction, a federal trial without competent and intelligent waiver of counsel bars a conviction of the accused.[25] Where it cannot be deduced from the record whether counsel was properly waived, we think, no other remedy being then available and sound reasons existing for failure to seek appropriate earlier relief, this motion in the nature of the extraordinary writ of *coram nobis* must be heard by the federal trial court.[26] Otherwise a wrong may stand uncorrected which the available remedy would right. Of course, the absence of a showing of waiver from the record does not of itself invalidate the judgment. It is presumed the proceedings were correct and the burden rests on the accused to show otherwise. *Johnson* v. *Zerbst*, *supra*, at 468; *Adams* v. *McCann*, *supra*, at 281; cf. *Darr* v. *Burford*, 339 U. S. 200, 218.

Although the term has been served, the results of the conviction may persist. Subsequent convictions may

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[23] Until *Johnson* v. *Zerbst*, 304 U. S. 458, there was no uniform practice in the federal courts to have the orders show the judges' conclusion that there had been a competent waiver of counsel. Cf. *United States* v. *Steese*, 144 F. 2d 439, 443.

[24] See note 15, *supra*. *Barber* v. *United States*, 142 F. 2d 805, 807; *Bronson* v. *Schulten*, 104 U. S. 410, 416; Powell, Appellate Proceedings (1872), 108; Black, Judgments (2d ed.), 460.

[25] See also *Walker* v. *Johnston*, 312 U. S. 275; *Glasser* v. *United States*, 315 U. S. 60; Fed. Rule Crim. Proc. 44.

[26] Cf. *Brown* v. *Allen*, *supra*, at 485–486.

carry heavier penalties, civil rights may be affected.[27] As the power to remedy an invalid sentence exists, we think, respondent is entitled to an opportunity to attempt to show that this conviction was invalid.

Affirmed.

MR. JUSTICE MINTON, with whom THE CHIEF JUSTICE, MR. JUSTICE JACKSON and MR. JUSTICE CLARK join, dissenting.

I am unable to agree with the decision of the Court resurrecting the ancient writ of error *coram nobis* from the limbo to which it presumably had been relegated by Rule 60 (b) F. R. Civ. P. and 28 U. S. C. § 2255, assuming that the writ has ever been available in the federal courts to review criminal proceedings. A brief reference to the record will emphasize my reasons for doubting the wisdom of this action.

On December 18, 1939, respondent, upon a plea of guilty, was sentenced in a Federal District Court to four years' imprisonment on each of eight counts charging divers violations of 18 U. S. C. § 317 (now 18 U. S. C. §§ 1702, 1708) and 18 U. S. C. § 347 (now 18 U. S. C. § 500). The sentences ran concurrently and were fully served by respondent, during which time he never questioned their validity. In 1950, respondent was convicted of a state crime, apparently attempted burglary in the third degree, by a New York court and sentenced under that State's Multiple Offenders Law.[1] The 1939 federal conviction was relied upon to bring respondent within the multiple offenders statute, making possible an increased sentence for the state offense. Respondent is now imprisoned by New York pursuant to that sentence.

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[27] *Fiswick* v. *United States*, 329 U. S. 211; Note, 59 Yale L. J. 786.

[1] New York Penal Law, § 1941.

Approximately fourteen months after the New York conviction, more than twelve years after being sentenced on the federal conviction, and more than eight years after the federal sentence was completed, respondent filed this "Application for a Writ of Error Coram Nobis" in the Federal District Court in which he had been convicted. He requested that the federal judgment of conviction "be set aside, vacated, and be declared null and void" since at the time of the conviction, he neither had the assistance of counsel nor was informed of his constitutional right to counsel, and at the time was only nineteen years of age and without knowledge of the law. Respondent did not allege his innocence of the federal charges or set forth any facts from which innocence could be inferred. And respondent has attempted no explanation of his prolonged delay in seeking to remedy the asserted violation of his constitutional rights, nor intimated that he is now suffering some federal disability as a result of the conviction.

The Court now holds that the validity of a conviction by a federal court for a federal offense may be inquired into, long after the punishment imposed for such offense has been satisfied, by a "motion in the nature of a writ of error *coram nobis*" whenever the federal conviction is taken into account by a state court in imposing sentence for a state crime. The basis for this highly unusual procedure is said to be the all-writs section of the Judicial Code, 28 U. S. C. § 1651 (a), which provides that:

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate *in aid of their respective jurisdictions and agreeable to the usages and principles of law.*" [2]

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[2] Emphasis added.

I agree with the majority for the reasons given that procedures other than under the all-writs section are not open to respondent under the circumstances of this case. But I am also convinced that the all-writs section does not countenance the relief sought. Two essential prerequisites to the issuance of a writ pursuant to that statute are lacking: (1) the writ here authorized is not in aid of the jurisdiction of the District Court, and (2) the writ is not "agreeable to the usages and principles" of present-day law.

That the writ does not issue in aid of the jurisdiction of the District Court appears obvious. Respondent has received a final judgment of conviction, has satisfied the sentence imposed thereunder, and is no longer subject to punishment or control by the court because of the conviction. Therefore, I believe that the jurisdiction of the District Court has been exhausted, the judgment is *functus officio*, and we should hold that it is no longer subject to collateral attack, just as the courts generally have held that an appeal will not lie from a judgment of conviction when the judgment has been satisfied. *Gillen* v. *United States*, 199 F. 2d 454; *Bergdoll* v. *United States*, 279 F. 404.[3] Insofar as is shown here, all federal consequences of the proceedings have ended and hence the jurisdiction of the District Court should be held to have ended also. Cf. *Ex parte Lange*, 18 Wall. 163; *United States* v. *Plumer*, 27 Fed. Cas. 561, 573–574. See *Tinkoff* v. *United States*, 129 F. 2d 21, 23. Writs may be issued under the all-writs section in aid of a jurisdiction that already exists, not to regain a jurisdiction that has been exhausted. Cf. *Adams* v. *United States ex rel. McCann*, 317 U. S. 269; *Whitney* v. *Dick*, 202 U. S. 132; *M'Clung* v. *Silliman*, 6 Wheat. 598. If anything, the purpose of this writ would

[3] Decisions of state courts on the point are collected in 24 C. J. S., Criminal Law, § 1668; 17 C. J., Criminal Law, §§ 3326, 3327.

appear to be to aid the jurisdiction of the New York courts because of their professed inability to inquire into the validity of a federal conviction serving as a basis for an increased sentence under the multiple offenders law.[4]

As to the second prerequisite—that the writ be agreeable to the usages and principles of law—I am of the view that resort to the common-law writ of *coram nobis* has been precluded, if it was ever available in the federal courts to reach matters such as are involved here. See *United States* v. *Smith*, 331 U. S. 469, 475, note 4; *United States* v. *Mayer*, 235 U. S. 55; *United States* v. *Port Washington Brewing Co.*, 277 F. 306. The writ issued at common law to correct errors of fact unknown to the court at the time of the judgment, without fault of the defendant, which, if known, would probably have prevented the judgment.[5] The probability of a different result if the facts had been known is a prime requisite to the success of the writ. The sentencing court here must have known that respondent did not have an attorney and was not advised of his right to counsel, if such are the facts. What then was it that the court didn't know which if it had known would probably have produced a different result? The respondent doesn't say, nor does

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[4] We do not know, moreover, that New York will modify its second offender sentence, imposed at a time when the federal conviction had not been questioned, even if the federal conviction is later vacated.

[5] *United States* v. *Mayer*, 235 U. S. 55, 67–69; *Robinson* v. *Johnston*, 118 F. 2d 998, 1001, vacated, 316 U. S. 649, rev'd on other grounds, 130 F. 2d 202; Freedman, The Writ of Error Coram Nobis, 3 Temp. L. Q. 365. The scope of the writ has been expanded by some States to provide a vehicle for collateral redress of denials of constitutional rights, usually because the traditional procedures for affording such relief are for some reason inadequate. *Hysler* v. *Florida*, 315 U. S. 411, 415; Fuld, The Writ of Error Coram Nobis, 117 N. Y. L. J. 2212, 2230, 2248; Note, 26 Ind. L. J. 529; Note, 39 Ky. L. J. 440.

he suggest how a lawyer might have helped him unless he picked the lock on the jailhouse door."

Proceedings to obtain the writ are generally considered to be civil in nature,[7] just as habeas corpus is a civil proceeding although most often used to obtain relief from criminal judgments.[8] Rule 60 (b) of the Civil Rules expressly abolishes writs of error *coram nobis* and prescribes that civil proceedings for attacking a final judgment shall be by motion as provided in the Rules or by an independent action. Six grounds for such relief are set forth in Rule 60 (b),[9] which also requires that a motion thereunder shall be made within a year after the judgment if based on mistake, newly-discovered evidence, or fraud, and "within a reasonable time" if bottomed on other grounds.

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[6] See *United States* v. *Moore*, 166 F. 2d 102.

[7] *People* v. *Kemnetz*, 296 Ill. App. 119, 15 N. E. 2d 883; *State* v. *Youngblood*, 221 Ind. 408, 48 N. E. 2d 55; *State* v. *Spencer*, 219 Ind. 148, 41 N. E. 2d 601; *State* v. *Ray*, 111 Kan. 350, 207 P. 192; *Elliott* v. *Commonwealth*, 292 Ky. 614, 167 S. W. 2d 703; cf. *United States* v. *Kerschman*, 201 F. 2d 682. See also cases collected in 24 C. J. S., Criminal Law, § 1606 (a).

[8] *Ex parte Tom Tong*, 108 U. S. 556.

[9] "MISTAKES; INADVERTENCE; EXCUSABLE NEGLECT; NEWLY DISCOVERED EVIDENCE; FRAUD, ETC. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59 (b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. . . ."

Leaving open the question of whether respondent has advanced sufficient reasons for relief pursuant to Rule 60 (b) if the proceedings had been timely commenced, he has not established that these proceedings were instituted within a reasonable time after entry of the judgment of conviction, even if the one-year period of limitation is not applicable. Respondent has not sought to explain his long delay in seeking to set aside the federal judgment, and twelve years' delay would appear to be unreasonable on its face, absent unusual circumstances which are not shown to be present here. *United States* v. *Moore*, 166 F. 2d 102, 105; *Farnsworth* v. *United States*, 91 U. S. App. D. C. 121, 198 F. 2d 600; *United States* v. *Bice*, 84 F. Supp. 290, aff'd, 177 F. 2d 843.

Apparently, having once abolished the common-law writ of *coram nobis*, the Court now undertakes to reestablish it under the name of "a motion in the nature of *coram nobis*" in order to escape the limitations laid down in Rule 60 (b). Rule 60 (b) is said to be inapplicable because *coram nobis* may be sought by a motion in the criminal case rather than in a separate, independent proceeding. There is no indication that this "application" was intended as a motion in the case rather than an independent proceeding to set aside the prior judgment, and several courts have stated that *coram nobis* proceedings retain their civil character under the modern practice.[10]

But assuming the Civil Rules to be inapposite, I believe that Congress superseded the common-law writ of *coram nobis* in enacting 28 U. S. C. § 2255.[11] As

[10] See cases cited in note 7, *supra*.

[11] "A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to

the Reviser's Note makes clear, that section "restates, clarifies and simplifies the procedure *in the nature of the ancient writ of error coram nobis.*"[12] H. R. Rep. No. 308, 80th Cong., 1st Sess. A-180. See *United States* v. *Hayman*, 342 U. S. 205, 214–219. In enacting this comprehensive procedure for collateral attacks on federal criminal judgments, Congress has supplied the remedy to which resort must be had. Since Congress did not see fit in § 2255 to extend the remedy there provided to persons not in federal custody under the judgment attacked, I do not feel free to do so.

It may be said that the federal conviction is still being used against respondent and, therefore, some relief ought to be available. Of course the record of a conviction for a serious crime is often a lifelong handicap. There are a dozen ways in which even a person who has reformed, never offended again, and constantly endeavored to lead an upright life may be prejudiced thereby. The stain on his reputation may at any time threaten his social standing or affect his job opportunities, for example. Is *coram nobis* also to be available in such cases? The relief being devised here is either wide open to every ex-convict as long as he lives or else it is limited to those who have returned to crime and want the record expunged to lessen a subsequent sentence. Either alternative seems unwarranted to me.

The important principle that means for redressing deprivations of constitutional rights should be available often clashes with the also important principle that at some point a judgment should become final—that litiga-

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impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence."

[12] Emphasis added.

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tion must eventually come to an end. These conflicting principles have traditionally been accommodated in federal criminal cases by permitting collateral attack on a judgment only during the time that punishment under the judgment is being imposed, and Congress has so limited the use of proceedings by motion under 28 U. S. C. § 2255. If that is to be changed, Congress should do it.

Syllabus.

GENERAL PROTECTIVE COMMITTEE FOR THE HOLDERS OF OPTION WARRANTS OF THE UNITED CORPORATION *v.* SECURITIES AND EXCHANGE COMMISSION ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 184. Argued December 2, 1953.—Decided January 4, 1954.

A voluntary plan of reorganization submitted to the Securities and Exchange Commission under § 11 (e) of the Public Utility Holding Company Act of 1935, which would enable a registered holding company to comply with § 11 (b) of the Act by converting itself into an investment company, was approved by the Commission. The Commission expressly provided in its order of approval that certain provisions of the plan would not be operative "until an appropriate United States District Court shall, upon application thereto, enter an order enforcing said provisions"; but the Commission had not yet applied to the District Court for enforcement under § 11 (e). *Held:* On a petition for review under § 24 (a) of the Act, the Court of Appeals was without jurisdiction over those provisions of the plan which the Commission had made operative on enforcement by the District Court, but had jurisdiction of the controversy so far as it related to other provisions of the plan. Pp. 522–536.

92 U. S. App. D. C. 172, 203 F. 2d 611, affirmed in part and reversed in part.

The Securities and Exchange Commission approved a reorganization plan under § 11 (e) of the Public Utility Holding Company Act of 1935. Holding Company Act Releases Nos. 10614, 10643. On review in the Court of Appeals, the petitioner here was allowed to intervene, and the Court of Appeals affirmed the Commission's order. 92 U. S. App. D. C. 172, 203 F. 2d 611. This Court granted certiorari limited to the question of jurisdiction. 346 U. S. 810. *Affirmed in part and reversed in part*, p. 536.

John Mulford argued the cause for petitioner. With him on the brief were *Henry S. Drinker, Thomas Reath* and *M. Quinn Shaughnessy.*

William H. Timbers argued the cause for the Securities and Exchange Commission, respondent. With him on the brief were *Acting Solicitor General Stern* and *Alexander Cohen.*

Richard Joyce Smith argued the cause and filed a brief for the United Corporation, respondent.

Randolph Phillips, respondent, argued the cause *pro se. Joseph B. Hyman* was with him on the brief for Downing et al., respondents.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The United Corporation is a holding company registered under the Public Utility Holding Company Act of 1935, 49 Stat. 803, 15 U. S. C. § 79 *et seq.* Section 11 (b) of that Act requires each holding company, with exceptions not material here, to limit the operations of the holding-company system of which it is a part to a single integrated public-utility system and to businesses reasonably incidental or economically necessary or appropriate to that system. Section 11 (e) allows a registered holding company to submit a plan to the Commission which will enable it to comply with § 11 (b).

United controlled, directly or indirectly, various gas and electric utility companies in the East. It submitted a plan to the Commission which, it claimed, would complete its compliance with § 11 (b). The Commission rejected United's plan. 13 S. E. C. 854, 898–899. The Commission, however, withheld issuance of a dissolution order so as to afford United an opportunity to comply with the Act by divesting itself of control over its subsidiaries and by transforming itself into an investment

company. *Id.*, p. 899. The Commission accordingly directed that United cease to be a holding company and limit its corporate structure to a single class of stock, namely, common stock.[1]

No review of that order was sought. Thereafter United retired its preference stock by exchanging it for underlying portfolio securities and for cash. Other portfolio securities were disposed of through market sales and dividend distributions.

As of December 31, 1950, United had outstanding 14,529,491.5 shares of common stock, and option warrants entitling the holders to purchase 3,732,059 shares of common stock at any time at a price of $27.50 per share. As of December 31, 1950, United's assets consisted approximately of $57,000,000 of securities and $2,000,000 in cash and government bonds, which was equivalent to $4.12 per share of common stock. The securities, which consisted of common stocks of utility operating and holding companies, included 11.9 percent of the voting stock of Niagara Mohawk Power Corp., 28.3 percent of South Jersey Gas Co., 5.8 percent of the United Gas Improvement Co., 5.5 percent of the Columbia Gas System, Inc., and voting stocks of other companies in amounts less than 5 percent of the total outstanding.

United submitted a further plan which provided in essential part as follows:

First. The sale by United of all of its South Jersey common stock and of sufficient amounts of its stockholdings in the other utility companies so that within one year its resultant holdings would not exceed 4.9 percent of the voting stock of any of those companies.

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[1] Section 11 (b) places on the Commission the duty to require registered holding companies and their subsidiaries not only to limit, with specified exceptions, their operations to a single integrated public-utility system but also to simplify their capital structures.

Second. An offer to United's stockholders who wanted to withdraw from the company. Holders of 100 or more shares of United's common stock were offered common stock of Niagara Mohawk that United had in its portfolio; holders of smaller blocks of United's common stock were offered cash. These offers were on a *voluntary* basis.

Third. Cancellation of the option warrants without any compensation to the holders.

Fourth. Amendments to the charter and bylaws of United (without a vote of stockholders) to provide for cumulative voting in the election of directors and a 50 percent quorum at stockholders meetings.

The Commission approved the plan with modifications not material to the issues presented in this case. Holding Company Act Releases Nos. 10614, 10643.

First. The method of transforming United from a holding company into an investment company was approved.

Second. Offers to those stockholders who wanted to withdraw from the enterprise were held to be fair both to them and to those who chose to remain as investors in United.

Third. The holders of the option warrants were denied any participation in the reorganization on the ground that there was no reasonable expectation that the market price of the common stock would increase to the extent needed to give the warrants a recognizable value and that continuance of the warrants would be inherently deceptive to investors and perpetuate useless and unnecessary complexities in the corporate structure.

Fourth. The changes as respects cumulative voting and quorum requirements were approved.

The Commission in its order of approval stated that the provisions of the plan relating to the cancellation of the warrants and the amendment of the charter and bylaws would not be operative "until an appropriate

United States District Court shall, upon application thereto, enter an order enforcing said provisions." Holding Company Act Release No. 10643, p. 3. No such provision was made as respects the other provisions of the plan.

Some of the common stockholders thereupon filed a petition for review in the Court of Appeals for the District of Columbia under § 24 (a) of the Act.[2] They

[2] Section 24 (a) provides:

"Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission, or upon any officer thereof designated by the Commission for that purpose, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do. The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the

challenged the *First* and *Second* provisions of the plan, which we have described above. They also asked that the *Third* and *Fourth* provisions, the ones which were made subject to approval by the District Court, be approved by the Court of Appeals. The petitioner in this Court is a protective committee representing holders of the option warrants. It moved to intervene in the review proceedings in the Court of Appeals, claiming that forfeiture of the warrants was not justified. The Commission and United opposed the intervention on the ground that by reason of the Commission's order and § 11 (e) of the Act [8] only the District Court had jurisdiction to

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court affirming, modifying, or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347)."

[8] Section 11 (e) provides:

"In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of

review the provisions of the plan respecting the elimination of the warrants and the amendments to the charter and bylaws.

The Court of Appeals allowed petitioner to intervene. It held that so long as the Commission had not applied to a District Court under § 11 (e) to enforce a plan, the Court of Appeals had exclusive jurisdiction on petition of an aggrieved person under § 24 (a) to review the entire plan, including those provisions which the Commission made enforceable by the District Court. The Court of Appeals further held that if it affirmed or modified an order of the Commission approving a plan and the Commission thereafter applied to the District Court to obtain enforcement, the District Court would have no function except to enforce, since the ruling by the Court of Appeals on the fairness of the plan would be binding on the District Court. Accordingly the Court of Appeals reviewed the entire plan, found it fair and equitable in all respects, and affirmed the Commission's order. 92 U. S. App. D. C. 172, 203 F. 2d 611. The case is here on certiorari limited to the question of jurisdiction. 346 U. S. 810.

The question is not whether there is judicial review of orders of the Commission. The question is which orders are reviewable in the District Court, which in the Court of Appeals. The first reading of the Act may leave the impression that there is conflict between § 24 (a) and § 11 (e). Section 24 (a) gives review in the Court of Appeals of "an order" of the Commission and grants the

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such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed."

Court of Appeals "exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part." This is clearly broad enough to include an order of the Commission under § 11 respecting a plan of a holding company seeking compliance with § 11 (b). Section 11 (e), however, provides in some instances for review of such plans on application by the Commission to the District Court. Moreover, the Commission by virtue of § 18 (f)[4] may apply to the District Court for enforcement of any of its orders where it appears that someone is about to commit a violation.

We are tendered several alternatives:

1. That the Court of Appeals having first acquired jurisdiction can and should review the entire plan.

2. That the District Court can and should review all phases of the plan in an enforcement proceeding and, pending application for enforcement, no review of any phase of the plan should be entertained by the Court of Appeals.

3. That a so-called split review is permissible where as here the Commission has reserved for enforcement pro-

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[4] Section 18 (f) provides:

"Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this title, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper district court of the United States, the [district court of the United States for] the District of Columbia, or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this title or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General, who, in his discretion, may institute the appropriate criminal proceedings under this title."

ceedings in the District Court only certain provisions of the plan, the Court of Appeals being restricted under § 24 (a) to those not so reserved.

We have concluded that the so-called split review is permissible under the circumstances here present and that the Court of Appeals had jurisdiction under § 24 (a) to review all questions tendered it, except those pertaining to the elimination of the option warrants and the amendments to the charter and bylaws. In result we affirm in part and reverse in part the Court of Appeals on the jurisdictional question to which we restricted the grant of the petition for certiorari.

It should be noted to begin with that the Act marks out two paths to compliance by a registered holding company with the requirements of the Act. One is the procedure under § 11 (b) whereby the Commission by order may require that designated steps be taken by the holding company. Failing that, the Commission may apply to a District Court for enforcement of its orders under § 11 (d). See *Commonwealth & Southern Corp.* v. *Securities & Exchange Commission*, 134 F. 2d 747. We are not concerned here with that method of bringing holding companies into compliance with the Act. We deal here with the second method of compliance—the voluntary reorganization which the company itself submits under the broad discretion Congress left to management to determine how to bring their systems into compliance with the Act. Our problem starts under § 11 (e) with the provision that a holding company "may . . . submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action . . . enabling such company . . . to comply with the provisions of subsection (b)."

We turn then to problems involved in the efforts of registered holding companies voluntarily to meet the requirements of the Act.

The Congress contemplated that under this Act some holding companies might satisfy the requirements of § 11 by divesting themselves of control and converting themselves into investment companies. See S. Rep. No. 621, 74th Cong., 1st Sess., p. 13. If in anticipation of that step a holding company desired to give its security holders an opportunity to withdraw from the enterprise and with the approval of the Commission made them an offer to exchange their securities for securities in its portfolio, there would be no doubt that the fairness of that offer would be reviewable by the Court of Appeals under § 24 (a) on petition of a security holder. Two cases drawn from United's program of compliance with the Act are illustrative.

After the Commission ordered United to simplify its capital structure and cease to be a holding company, United proposed a plan for eliminating its preference stock by making an offer to exchange on a voluntary basis securities of subsidiaries and cash for the preference stock. The Commission approved; and review of that plan was had in the Court of Appeals under the procedure of § 24 (a) of the Act. *Phillips* v. *Securities & Exchange Commission*, 153 F. 2d 27. Later United proposed the *pro rata* distribution of shares of a subsidiary to holders of its common stock. The Commission approved; and review of that plan was had under § 24 (a) in the Court of Appeals. *Phillips* v. *Securities & Exchange Commission*, 87 U. S. App. D. C. 380, 185 F. 2d 746.

If, therefore, United had offered its common stockholders cash or portfolio securities for their common stock and had put the offer in a separate plan, not making it physically a part of a more comprehensive plan, and the Commission had approved the exchange, there can be no doubt that that plan could have been reviewed by the Court of Appeals under § 24 (a). We are unable to see why the

mere fact that the offer is not in isolation but one of several proposals joined together for presentation to the Commission and approved by the Commission at the time it approves the other proposals should make a difference for purposes of judicial review.

Mr. Justice Rutledge writing for the Court in *Securities & Exchange Commission* v. *Central-Illinois Corp.*, 338 U. S. 96, pointed out that the difference between § 11 (e) and § 24 (a) is not essentially in the scope of judicial review. Rather, it is in the function which the two systems of review perform. As he said, § 11 (e) serves "to mobilize the judicial authority in carrying out the policies of the Act." *Id.*, p. 125. The full import of that statement can be understood only if § 11 (e) and the functions it performs are appreciated. Section 11 (e) applies to a plan which a holding company submits to the Commission for purposes of complying with the Act. In other words, it applies to what traditionally has been known in the field of business and finance as voluntary reorganizations, that is to say, reorganizations designed by the management, not those imposed on a company from without. The holding company proposes the voluntary reorganization; the Commission, after hearing, approves, if it finds the plan "necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan." If § 11 (e) ended there, it would be plain that judicial review would be had either under § 24 (a) on a petition by an "aggrieved" person or under § 18 (f) if and when the Commission brought an action to enforce compliance with its order approving a plan. Section 11 (e), however, has its own enforcement procedure, somewhat peculiarly worded. It gives a registered holding company the standing to ask that the enforcement machinery of the Act be placed behind its voluntary plan of reorganiza-

tion.[5] Section 11 (e) provides, "The Commission, *at the request of the company*, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan." (Italics added.)

The Commission may or may not accede to the company's suggestion. Section 11 (e) does not make it mandatory for the Commission to do so. It only says that the Commission "may" do so. That implies the exercise of discretion. The company might request, as here, that only some of the terms and provisions of a plan

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[5] In speaking of plans of voluntary reorganization under § 11 (e) the Court in *Commonwealth & Southern Corp.* v. *Securities & Exchange Commission*, 134 F. 2d 747, 751, said:

"If the plan is one which can be carried out by the sole action of the parties thereto no further proceedings are needed. If not, the subsection authorizes the Commission, at the request of the company proposing the plan, to make application to a district court to enforce and carry out the plan. In this proceeding the court, if it finds the plan fair, equitable and appropriate, may direct it to be carried out, taking possession of the company and its assets if necessary to that end. . . .

"It will thus be seen that the congressional purpose is to leave open to the holding companies a broad area of discretion in determining just how they are to bring their systems into compliance with the required standards. . . .

"It is obvious that in many cases the desired result may be reached in more than one way. Congress evidently intended to permit the Commission to leave to the company involved the initiative in suggesting from among the available alternative methods that one which it deems most appropriate. This seems clear in the light of the fact that under section 11 (e) the company is not restricted to proposing a plan of compliance which it is in a position to carry out itself but it may also propose a plan affecting the rights of third persons which it may, through the Commission, request a court to enforce against the opposition of those third persons. It is only if the company does not propose a plan which the Commission and the court approve that the Commission under section 11 (d) itself may propose and seek enforcement of a plan against the opposition of the company."

be submitted to the enforcement proceedings of the Act; or it might ask that each and every proposal be so treated. The Commission might refuse the request or it might grant it in whole or in part. The considerations governing the exercise of the Commission's discretion would embrace a variety of factors.

It may be necessary to eliminate one class of stock; an exchange on a voluntary basis may not be possible because some security holders object. Therefore a *compulsory* retirement of the stock may be necessary. One step in United's program of compliance involved that procedure, as is shown by *In re United Corp.*, 82 F. Supp. 196. United proposed a plan for the *compulsory* retirement of preference stock; the Commission approved and applied to the District Court for enforcement.

An enforcement decree on one phase of a voluntary plan of reorganization may be an appropriate and convenient means (if not a necessary one) to modify a certificate of incorporation. Thus in Delaware the corporation statute directs the Secretary of State to accept a decree of a federal court enforcing a provision of a plan which modifies, alters, or repeals the bylaws of a Delaware corporation or amends its certificate of incorporation. 8 Del. Code Ann., 1953, § 245.

Illustrations could be multiplied. But those we have given indicate that a holding company may not be able to carry through without some degree of compulsion all phases of the voluntary plan it submits, that it may need the force of a judicial decree behind the Commission's order in order to put through its reorganization.

On the other hand, the holding company might conclude that market conditions were so favorable, its own financial situation so strong, the terms of the voluntary reorganization so attractive that it would need no help from any source to effectuate the plan, once the Commission approved.

That is the reason Congress left the choice—the right to ask for enforcement help—to the holding company. Conceivably the Commission might refuse to give the help requested unless other phases of the plan were also put through enforcement proceedings. That conclusion might be reached where the several aspects of the plan were so closely and intimately related one to the other that the fairness of one turned on the fairness of the other. No such issue arises here, for the question whether the common stockholders who want to withdraw from United have been offered enough Niagara Mohawk stock or enough cash has nothing to do either with the elimination of the option warrants or the changes in the charter and bylaws to govern stockholders who do not withdraw from the enterprise.

We have said enough to indicate some of the considerations confronting the Commission when it decides, in connection with a voluntary reorganization plan under § 11 (e), whether it will "mobilize the judicial authority in carrying out the policies of the Act," to use the words of Mr. Justice Rutledge in the *Central-Illinois Corp.* case, *supra*. The Commission may send only one provision of a plan of voluntary reorganization into enforcement proceedings and let all others go the route of § 24 (a) should an aggrieved person desire to take them there. Here as in other fields (*Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177, 194) the relation of remedy to policy is peculiarly for the administrative agency. See *American Power Co.* v. *Securities & Exchange Commission*, 329 U. S. 90, 112. We cannot say that the Commission abused its discretion in the present case, for, as we have already observed, the amendments of the charter and bylaws and the fairness of the elimination of the option warrants have no apparent relevancy to the manner in which the common stockholders, who sought review in

the Circuit Court under § 24 (a), say they have been treated.

It may be, as some argue, that it would be a better scheme to have all or none of a plan go into enforcement proceedings under § 11 (e). If the entire plan were presented in the enforcement proceedings, all parties would be notified and heard at one time. But Congress in its wisdom has provided differently. The problem relates, as we have said, only to voluntary reorganizations, that is to plans submitted by the companies themselves to bring their operations into compliance with the Act. The history of voluntary recapitalizations, readjustments, and reorganizations may well have suggested that the litigious issues would not be numerous, that overall judicial review of the total plan need not be made mandatory, that only select phases and aspects of voluntary reorganization need be put through enforcement proceedings. Certainly one who has an isolated point of objection, whose protest relates only to a single phase of a plan has an advantage in the review accorded him by § 24 (a). He can bring suit in the Court of Appeals in the circuit where he resides or has his principal place of business, or in the District of Columbia. He can sue at once in his own bailiwick and not have to await institution of an enforcement proceeding perhaps in some faraway place. He can have a hearing on his own personal grievance without running the risk that his case may be lost in the large shuffle of an enforcement proceeding where many parties and many interests are involved.

There is nothing strange or irrational in routing the common stockholders in this case to the Court of Appeals and the option warrant holders to the District Court. Each will have his day in court. Nothing that one court does will impinge on the other. Each court will be performing a different function. Whether a better procedure

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could be devised is not for us to determine. It is sufficient that the procedure indicated is permissible under the Act, and that the Commission in selecting certain phases of a plan for submission to enforcement proceedings did not, to borrow a phrase from the Court of Appeals for the Third Circuit, lose "sight of the law." *

We accordingly affirm the Court of Appeals in taking jurisdiction over the controversy insofar as it related (1) to the sale by United of its holdings and (2) to the offers it made to its stockholders who wanted to withdraw. We reverse the Court of Appeals in taking jurisdiction over the provisions of the voluntary plan of reorganization which the Commission in its order made operative on enforcement by the District Court.

So ordered.

* See *In re Standard Gas & Electric Co.*, 151 F. 2d 326, 331.

Syllabus.

THEATRE ENTERPRISES, INC. *v.* PARAMOUNT FILM DISTRIBUTING CORP. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 19. Argued November 30, December 1, 1953.—Decided January 4, 1954.

Petitioner brought suit in a Federal District Court under the Clayton Act for treble damages and an injunction, alleging that respondent motion picture producers and distributors had violated the anti-trust laws by conspiring to restrict "first-run" pictures to downtown Baltimore theatres, thus confining petitioner's suburban theatre to subsequent runs and unreasonable "clearances." There was no direct evidence of illegal agreement between respondents; and the jury returned a general verdict for respondents. *Held:*

1. Upon the evidence in the case, the trial judge properly refused to direct a verdict for petitioner and properly submitted the issue of conspiracy to the jury. Pp. 539–542.

(a) Proof of parallel business behavior does not conclusively establish agreement, nor does such behavior itself constitute a Sherman Act offense. Pp. 540–541.

(b) The decrees in *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, alone or in conjunction with petitioner's other proof, formed no basis for a directed verdict for petitioner, since those decrees were only prima facie evidence of a conspiracy covering the area and existing during the period there involved, and since petitioner's allegation of conspiracy was factually contested. Pp. 541–542.

2. In his instructions to the jury, the trial judge did not fail to give sufficient weight to the decrees in the *Paramount* case. Pp. 542–544.

(a) The instructions in this connection were not so superficial and so limited as to deprive petitioner of any of the benefits conferred upon it by § 5 of the Clayton Act. Pp. 542–543.

(b) It was not error for the trial judge to instruct the jury, in effect, that the *Paramount* decrees alone could not support a recovery by petitioner and that additional evidence was required to relate the prior *Paramount* conspiracy to Baltimore and to the claimed damage period. Pp. 543–544.

201 F. 2d 306, affirmed.

Philip B. Perlman and *Holmes Baldridge* argued the cause for petitioner. With them on the brief were *Edwin P. Rome* and *Sol C. Berenholtz.*

Bruce Bromley argued the cause for the Paramount Film Distributing Corporation et al., and *Ferdinand Pecora* argued the cause for Warner Bros. Pictures Distributing Corporation et al., respondents. With them on the brief were *Milton Handler, R. Dorsey Watkins* and *J. Cookman Boyd, Jr. John Fletcher Caskey* entered an appearance for the Twentieth Century-Fox Film Corporation, respondent.

MR. JUSTICE CLARK delivered the opinion of the Court.

Petitioner brought this suit for treble damages and an injunction under §§ 4 and 16 of the Clayton Act,[1] alleging that respondent motion picture producers and distributors[2] had violated the antitrust laws[3] by conspiring to restrict "first-run"[4] pictures to downtown Baltimore theatres, thus confining its suburban theatre to subsequent runs and unreasonable "clearances."[5] After hear-

[1] 38 Stat. 731, 737, 15 U. S. C. §§ 15, 26.

[2] Respondents are: Paramount Film Distributing Corp., Loew's Inc., RKO Radio Pictures, Inc., Twentieth Century-Fox Film Corp., Universal Film Exchanges, Inc., United Artists Corp., Warner Bros. Pictures Distributing Corp., Warner Bros. Circuit Management Corp., Columbia Pictures Corp.

[3] Sections 1 and 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. §§ 1, 2, and § 2 of the Clayton Act, 38 Stat. 730, as amended, 15 U. S. C. § 13. Petitioner has dropped the allegation of a Clayton Act violation.

[4] "Runs are successive exhibitions of a feature in a given area, first-run being the first exhibition in that area, second-run being the next subsequent, and so on . . . ." *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 144-145, n. 6 (1948).

[5] "A clearance is the period of time, usually stipulated in license contracts, which must elapse between runs of the same feature within a particular area or in specified theatres." *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 144, n. 6 (1948).

ing the evidence a jury returned a general verdict for respondents. The Court of Appeals for the Fourth Circuit affirmed the judgment based on the verdict. 201 F. 2d 306. We granted certiorari. 345 U. S. 963.

Petitioner now urges, as it did in the Court of Appeals, that the trial judge should have directed a verdict in its favor and submitted to the jury only the question of the amount of damages. Alternatively, petitioner claims that the trial judge erred by inadequately instructing the jury as to the scope and effect of the decrees in *United States* v. *Paramount Pictures, Inc.*, the Government's prior equity suit against respondents.[6] We think both contentions are untenable.

The opinion of the Court of Appeals contains a complete summary of the evidence presented to the jury. We need not recite that evidence again. It is sufficient to note that petitioner owns and operates the Crest Theatre, located in a neighborhood shopping district some six miles from the downtown shopping center in Baltimore, Maryland. The Crest, possessing the most modern improvements and appointments, opened on February 26, 1949. Before and after the opening, petitioner, through its president, repeatedly sought to obtain first-run features for the theatre. Petitioner approached each respondent separately, initially requesting exclusive first-runs, later asking for first-runs on a "day and date" basis.[7] But respondents uniformly rebuffed petitioner's efforts and adhered to an established policy of restricting first-runs in Baltimore to the eight downtown theatres. Admittedly there is no direct evidence of illegal agree-

[6] 66 F. Supp. 323 (1946), 70 F. Supp. 53 (1946), reversed and remanded in part, 334 U. S. 131 (1948), 85 F. Supp. 881 (1949), affirmed, 339 U. S. 974 (1950).

[7] A first-run "day and date" means that two theatres exhibit a first-run at the same time. Had petitioner's request for a day-and-date first-run been granted, the Crest and a downtown theatre would have exhibited the same features simultaneously.

ment between the respondents and no conspiracy is charged as to the independent exhibitors in Baltimore, who account for 63% of first-run exhibitions. The various respondents advanced much the same reasons for denying petitioner's offers. Among other reasons, they asserted that day-and-date first-runs are normally granted only to noncompeting theatres. Since the Crest is in "substantial competition" with the downtown theatres, a day-and-date arrangement would be economically unfeasible. And even if respondents wished to grant petitioner such a license, no downtown exhibitor would waive his clearance rights over the Crest and agree to a simultaneous showing. As a result, if petitioner were to receive first-runs, the license would have to be an exclusive one. However, an exclusive license would be economically unsound because the Crest is a suburban theatre, located in a small shopping center, and served by limited public transportation facilities; and, with a drawing area of less than one-tenth that of a downtown theatre, it cannot compare with those easily accessible theatres in the power to draw patrons. Hence the downtown theatres offer far greater opportunities for the widespread advertisement and exploitation of newly released features, which is thought necessary to maximize the over-all return from subsequent runs as well as first-runs. The respondents, in the light of these conditions, attacked the guaranteed offers of petitioner, one of which occurred during the trial, as not being made in good faith. Respondents Loew's and Warner refused petitioner an exclusive license because they owned the three downtown theatres receiving their first-run product.

The crucial question is whether respondents' conduct toward petitioner stemmed from independent decision or from an agreement, tacit or express. To be sure, business behavior is admissible circumstantial evidence from which the fact finder may infer agreement. *Interstate Circuit,*

Inc. v. *United States*, 306 U. S. 208 (1939); *United States* v. *Masonite Corp.*, 316 U. S. 265 (1942); *United States* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707 (1944); *American Tobacco Co.* v. *United States*, 328 U. S. 781 (1946); *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131 (1948). But this Court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense. Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy;[8] but "conscious parallelism" has not yet read conspiracy out of the Sherman Act entirely. Realizing this, petitioner attempts to bolster its argument for a directed verdict by urging that the conscious unanimity of action by respondents should be "measured against the background and findings in the *Paramount* case." In other words, since the same respondents had conspired in the *Paramount* case to impose a uniform system of runs and clearances without adequate explanation to sustain them as reasonable restraints of trade, use of the same device in the present case should be legally equated to conspiracy. But the *Paramount* decrees, even if admissible, were only prima facie evidence of a conspiracy covering the area and existing during the period there involved. Alone or in conjunction with the other proof of the petitioner, they would form no basis for a directed verdict. Here each of the respondents had denied the existence of any collaboration and in addition had introduced evidence of the local conditions surrounding the Crest operation which, they contended, precluded it from being a successful first-run house. They also attacked the good faith of the guaranteed offers of the

[8] Rahl, Conspiracy and the Anti-Trust Laws, 44 Ill. L. Rev. 743 (1950).

petitioner for first-run pictures and attributed uniform action to individual business judgment motivated by the desire for maximum revenue. This evidence, together with other testimony of an explanatory nature, raised fact issues requiring the trial judge to submit the issue of conspiracy to the jury.

Petitioner next contends that the trial judge, when instructing the jury, failed to give sufficient weight to the *Paramount* decrees. The decrees were admitted in evidence pursuant to § 5 of the Clayton Act,[9] which provides that a final judgment or decree rendered against a defendant in an equity suit brought by the United States under the antitrust laws "shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto . . . ." Exercising his discretion to choose the precise manner of explaining a decree to the jury,[10] the trial judge instructed that:

> ". . . [T]hese same defendants had, at a time previous to the opening of the Crest Theatre, conspired together in restraint of trade in violation of these same Anti-Trust laws, in restricting to themselves first run and in establishing certain clearances in numerous places throughout the United States. Thus, these proven facts, I instruct you, become *prima facie* evidence in the present case, which the plaintiff may use in support of its claim that what the defendants have done since those decrees, in the present case in Baltimore, is within the prohibition of those earlier decrees. However, this is only *prima*

[9] 38 Stat. 731, 15 U. S. C. § 16; Note, 65 Harv. L. Rev. 1400 (1952).

[10] *Emich Motors Corp.* v. *General Motors Corp.*, 340 U. S. 558 (1951), 61 Yale L. J. 417 (1952).

facie evidence. There was not before the Court in the prior case the present factual situation which is before you now with respect to Baltimore theatres. Therefore, it is still necessary in the present case, in order for the plaintiff to recover, for it to prove to your satisfaction, by the weight of the credible evidence, that these defendants, or some of them, have conspired in an unreasonable manner to keep first run exhibitions from the plaintiff, or have conspired to restrict plaintiff to clearances which are unreasonable."

These instructions, petitioner argues, were "so superficial and so limited as to deprive petitioner of any of the benefits conferred upon it" by § 5.

We cannot agree. The trial judge instructed, in effect, that the *Paramount* decrees alone could not support a recovery by petitioner; additional evidence was required to relate the presumed *Paramount* conspiracy to Baltimore and to the claimed damage period. The reasons for this are clear. The *Paramount* decrees did not rest on findings, nor were the findings based on evidence, of a particular conspiracy concerning restrictions on runs and clearances in Baltimore theatres; yet such a conspiracy is the nub of plaintiff's claim. The *Paramount* case involved a conspiracy found to exist as of 1945, which was enjoined no later than June 25, 1948; [11] but

[11] The 1946 decree of the three-judge District Court enjoined the defendants, *inter alia*, from conspiring with respect to runs and clearances. The decree was stayed by MR. JUSTICE REED pending the appeal to this Court. The stay expired, by its own terms, when the Court rendered its decision on May 3, 1948. But this decision, remanding the case to the District Court for further consideration, in no way altered the lower court's findings as to runs and clearances. 334 U. S. 131, 144-148; 85 F. Supp. 881, 885, 897. Hence, the injunctive provisions of the 1946 decree concerning runs and clearances were left intact. Following this Court's decision, the order on mandate was entered in the District Court on June 25, 1948.

the conspiracy alleged here involves a claimed damage period running from February 1949 to March 1950. Indeed, the relevancy of *Paramount* to the instant case is slight. We need not pass on respondents' contention that petitioner was entitled to no benefit at all from the earlier decrees. We merely hold that petitioner was entitled to no greater benefit than the trial judge gave it.

Affirmed.

MR. JUSTICE BLACK would reverse, being of opinion that the trial judge's charge to the jury as to the burden of proof resting on petitioner deprived it of a large part of the benefits intended to be afforded by the prima facie evidence provision of § 5 of the Clayton Act.

MR. JUSTICE DOUGLAS withdrew from the case after its submission and took no part in this decision.

SALSBURG v. MARYLAND.

APPEAL FROM THE COURT OF APPEALS OF MARYLAND.

No. 38. Argued October 20, 1953.—Decided January 11, 1954.

The Equal Protection Clause of the Fourteenth Amendment is not violated by the Maryland statute here involved, which makes evidence obtained by illegal search or seizure generally inadmissible in prosecutions in state courts for misdemeanors but permits the admission of such evidence in prosecutions in Anne Arundel County for certain gambling misdemeanors. Pp. 546–554.

(a) The statute is within the liberal legislative license allowed a state in prescribing rules of practice relating to its police power. Pp. 549–550.

(b) The statute is not rendered invalid by the fact that illegally obtained evidence is not admissible in prosecutions for lottery misdemeanors though admissible in prosecutions for operating gambling pools; nor by the fact that such evidence is not admissible in prosecutions for violations of county gambling restrictions though admissible in prosecutions for violations of comparable state gambling restrictions. P. 550.

(c) Distinctions based on county areas are not necessarily so unreasonable as to violate the Equal Protection Clause of the Fourteenth Amendment. Pp. 550–554.

(d) The statute does not affirmatively sanction illegal searches and seizures in violation of the Due Process Clause of the Fourteenth Amendment. P. 554.

201 Md. 212, 94 A. 2d 280, affirmed.

Appellant's conviction of a gambling misdemeanor was affirmed by the Maryland Court of Appeals over his objection that evidence had been admitted under a Maryland statute which violated the Equal Protection Clause of the Fourteenth Amendment. 201 Md. 212, 94 A. 2d 280. On appeal to this Court under 28 U. S. C. § 1257 (2), *affirmed*, p. 554.

Herbert Myerberg argued the cause and filed a brief for appellant.

By special leave of Court, *pro hac vice*, *Ambrose T. Hartman*, Assistant Attorney General of Maryland, argued the cause for appellee. With him on the brief were *Edward D. E. Rollins*, Attorney General, and *J. Edgar Harvey*, Deputy Attorney General.

MR. JUSTICE BURTON delivered the opinion of the Court.

The ultimate issue here is whether Maryland has violated the Equal Protection Clause of the Fourteenth Amendment by authorizing its courts, in prosecutions in Anne Arundel County for certain gambling misdemeanors, to admit evidence procured by illegal search or seizure. The violation is charged because Maryland, at the same time, prohibits the admission of such evidence in like prosecutions in other counties, and, even in Anne Arundel County, prohibits its admission in prosecutions for many other misdemeanors. For the reasons hereafter stated, we hold that Maryland's action is valid.

In 1952, police officers of Anne Arundel County arrested the appellant, Salsburg, and two other men, in a two-room building in the rear of a garage on the Governor Ritchie Highway in that County. The officers had no warrant but, when they received no answer to their knock on the locked door of the rear room, they broke it open with an ax. Upon entering, they found appellant and two companions, apparently engaged in operating a betting pool on horse races, and arrested them. The officers seized three telephones, two adding machines, several racing forms and much paraphernalia commonly used in operating such a betting pool. The State concedes that the entry, search and seizure were illegal.

Salsburg and his companions were brought to trial in the Circuit Court of Anne Arundel County charged with making or selling a book or pool on the result of a running race of horses in violation of Flack's Md. Ann. Code, 1951,

Art. 27, § 306.[1] Before trial each of the accused moved to quash the warrant, suppress and return the seized evidence, and dismiss the proceeding against him, all on the ground that the proceeding depended upon illegally seized evidence. Each claimed that the admission of such evidence was prohibited by a Maryland statute, known as the Bouse Act, and that a 1951 amendment to that Act which purported to allow the admission of such evidence, in such a prosecution in Anne Arundel County, was invalid because in violation of the Fourteenth Amendment.[2] The trial court admitted the evidence. Each of the accused was convicted and sentenced to serve six months in the Maryland House of Correction as well as to pay $1,000 plus costs. The Court of Appeals of Maryland affirmed the convictions of Salsburg's com-

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[1] In the warrant which started this proceeding before a Justice of the Peace, the section was identified as Art. 27, § 291, Flack's Md. Ann. Code, 1939.

[2] At the time of the trial, the Bouse Act, including amendments, appeared as follows in Art. 35, § 5, Flack's Md. Ann. Code, 1951:

"No evidence in the trial of misdemeanors shall be deemed admissible where the same shall have been procured by, through, or in consequence of any illegal search or seizure or of any search and seizure prohibited by the Declaration of Rights of this State; nor shall any evidence in such cases be admissible if procured by, through or in consequence of a search and seizure, the effect of the admission of which would be to compel one to give evidence against himself in a criminal case; provided, however, that nothing in this section shall prohibit the use of such evidence in Baltimore County, Baltimore City, Anne Arundel, Caroline, Carroll, Cecil, Frederick, Harford, Kent, Prince George's, Queen Anne's, Talbot, Washington, Wicomico and Worcester Counties, in the prosecution of any person for unlawfully carrying a concealed weapon. *Provided, further, that nothing in this section shall prohibit the use of such evidence in Anne Arundel,* Wicomico and Prince George's *Counties in the prosecution of any person for a violation of the gambling laws as contained in Sections 303–329, inclusive, of Article 27, sub-title 'Gaming,' or in any laws amending or supplementing said sub-title.*" (Emphasis supplied.)

panions on the ground that neither of them could complain of the illegality of the search or seizure because they had no title to or interest in the premises searched. *Rizzo* v. *Maryland*, 201 Md. 206, 93 A. 2d 280. As to Salsburg, the tenant of the premises, the Court of Appeals heard further argument on the constitutionality of the 1951 amendment and then affirmed the trial court. 201 Md. 212, 94 A. 2d 280. His case is here on appeal. 28 U. S. C. (Supp. V) § 1257 (2).

The history of the Bouse Act is enlightening. Originally Maryland courts followed the common-law practice of admitting evidence in criminal prosecutions without regard to the legality of its obtention. *Lawrence* v. *Maryland*, 103 Md. 17, 32–37, 63 A. 96, 102–104. In 1914, the decision in *Weeks* v. *United States*, 232 U. S. 383, announced a contrary rule of practice in the federal courts. It held that evidence illegally seized by federal officers is not admissible in federal prosecutions. In 1928, the Court of Appeals of Maryland declined to adopt that practice and reaffirmed the Maryland common-law practice. *Meisinger* v. *Maryland*, 155 Md. 195, 141 A. 536. In 1929, the General Assembly of Maryland passed the Bouse Act substantially adopting the federal practice for prosecutions of misdemeanors in the state courts.[3] This left the common-law practice in effect in felony cases. *Marshall* v. *Maryland*, 182 Md. 379, 384, 35 A. 2d 115, 118; *Delnegro* v. *Maryland*, 198 Md. 80, 86, 81 A. 2d 241, 244.

In 1935, prosecutions under the "Health-Narcotic Drugs" subtitle of the general title "Crimes and Punishments" were exempted from the Bouse Act.[4] In 1947,

[3] The original Bouse Act, Md. Laws 1929, c. 194, consisted of only that part of the first sentence which precedes the first proviso in Art. 35, § 5, Flack's Md. Ann. Code, 1951. See note 2, *supra*.

[4] Md. Laws 1935, c. 59, now Art. 27, § 368, of Flack's Md. Ann. Code, 1951.

a proviso was added exempting, in Baltimore County, prosecutions for unlawfully carrying a concealed weapon. Md. Laws 1947, c. 752. In 1951, that proviso was extended to Baltimore City and 13 counties, including Anne Arundel. Md. Laws 1951, c. 145. In the same year the amendment now before us exempted prosecutions in Anne Arundel County "*for a violation of the gambling laws as contained in Sections 288 to 307, inclusive, of Article 27 of the Annotated Code of Maryland (1939 Edition)* [now §§ 303–329 of the 1951 edition], *sub-title 'Gaming,' or in any laws amending or supplementing said sub-title.*" *Id.*, c. 704. Also in 1951 this exemption was extended to Wicomico and Prince George's Counties. *Id.*, c. 710.[5]

Appellant concedes that the State has the legislative "power" to choose either the rule which excludes or that which admits illegally seized evidence. He does not attack the validity of the application of one to felonies and of the other to misdemeanors. He contends, however, that the Equal Protection Clause of the Fourteenth Amendment is violated when Maryland admits the illegally seized evidence in prosecutions for certain misdemeanors in certain counties, but excludes it in prosecutions for the same type of misdemeanors in other counties and for somewhat comparable misdemeanors in the same and other counties. He sees no rational basis for the classifications made in the 1951 amendment.

Whatever may be our view as to the desirability of the classifications, we conclude that the 1951 amendment

[5] This trend has continued. In 1952, the exemption as to prosecutions for unlawfully carrying a concealed weapon was made statewide. Md. Laws 1952, c. 59. In 1953, the exemption as to prosecutions under the above-specified gambling laws has been extended to Worcester, Howard and Cecil Counties. Md. Laws 1953, cc. 84, 419. Finally, prosecutions in Wicomico County, under certain alcoholic beverage laws, have been exempted. *Id.*, c. 581.

is within the liberal legislative license allowed a state in prescribing rules of practice. A state has especially wide discretion in prescribing practice relating to its police power, as is the case here.

The 1951 amendment establishes no additional or different offenses in Anne Arundel County. It deals only with the admissibility of evidence in the prosecution of certain misdemeanors otherwise established by law. Rules of evidence, being procedural in their nature, are peculiarly discretionary with the law-making authority, one of whose primary responsibilities is to prescribe procedures for enforcing its laws. Several states have followed diametrically opposite policies as to the admission of illegally seized evidence. See Appendix, *Wolf* v. *Colorado*, 338 U. S. 25, 33–39. See also, *Adams* v. *New York*, 192 U. S. 585, 594–596. Maryland seeks to derive some benefit from each of the policies.

Appellant complains further that prosecutions for lottery misdemeanors are subject to the rule of exclusion of the Bouse Act, while those for operating gambling pools are exempt. He complains also that prosecutions for violations of county gambling restrictions are subject to the Act, while violations of comparable state gambling restrictions are not. In our opinion such differences are not fatal to the legislative scheme. We do not sit as a superlegislature or a censor. "To be able to find fault with a law is not to demonstrate its invalidity. It may seem unjust and oppressive, yet be free from judicial interference. The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific." *Metropolis Theatre Co.* v. *Chicago*, 228 U. S. 61, 69–70. See also, *Dominion Hotel* v. *Arizona*, 249 U. S. 265, 268. Cf. *Johnson* v. *Maryland*, 193 Md. 136, 66 A. 2d 504.

We find little substance to appellant's claim that distinctions based on county areas are necessarily so unrea-

sonable as to deprive him of the equal protection of the laws guaranteed by the Federal Constitution. The Equal Protection Clause relates to equality between persons as such rather than between areas. This was established long ago in a decision which upheld a statute of Missouri requiring that, in the City of St. Louis and four counties, appeals be made to the St. Louis Court of Appeals, whereas appeals made elsewhere in that State must be directed to the Supreme Court of Missouri. Speaking for the Court, Justice Bradley said:

> "[T]here is nothing in the Constitution to prevent any State from adopting any system of laws or judicature it sees fit for all or any part of its territory. If the State of New York, for example, should see fit to adopt the civil law and its method of procedure for New York City and the surrounding counties, and the common law and its method of procedure for the rest of the State, there is nothing in the Constitution of the United States to prevent its doing so. This would not, of itself, within the meaning of the Fourteenth Amendment, be a denial to any person of the equal protection of the laws. . . . It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances." *Missouri* v. *Lewis*, 101 U. S. 22, 31.[6]

[6] "The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each State prescribes its own modes of judicial proceeding. If diversities of laws and judicial proceedings may exist in the several States without violating the equality clause in the Fourteenth Amendment, there is no solid reason why there may not be such diversities

There seems to be no doubt that Maryland could validly grant home rule to each of its 23 counties and to the City of Baltimore to determine this rule of evidence by local option.[7] It is equally clear, although less usual, that a state legislature may itself determine such an issue for each of its local subdivisions, having in mind the needs and desires of each. Territorial uniformity is not a constitutional requisite. *Ocampo* v. *United States*, 234 U. S. 91, 98–99.

Maryland has followed a policy of thus legislating, through its General Assembly, upon many matters of local concern, including the prescription of different substantive offenses in different counties.[8] The cumbersome-

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in different parts of the same State." *Id.*, at 31. See also, *Mallett* v. *North Carolina*, 181 U. S. 589, 597–599; *Hayes* v. *Missouri*, 120 U. S. 68, 72.

[7] *E. g.*, as to local option in relation to intoxicating liquor, see *Lloyd* v. *Dollison*, 194 U. S. 445; *Rippey* v. *Texas*, 193 U. S. 504; and see *Ft. Smith Light Co.* v. *Board of Improvement*, 274 U. S. 387, 391.

[8] Without appraising their validity, but as illustrating Maryland practice, we find Flack's Md. Ann. Code, 1951, full of such examples. Art. 2B—differing requirements as to sales of alcoholic beverages in various counties and cities; Art. 27, § 136—one county is exempted from a general prohibition against interference with water supply; § 146—deals with the effect of disorderly conduct in three counties; § 545—exempts two counties from certain provisions against placing tacks, broken glass, etc., on highways; § 566—makes special provisions as to junk yards in five counties; §§ 578–610B—prescribe a variety of Sabbath-breaking provisions for several counties and municipalities; Art. 51, § 7—grants a right of jury service to women, except in ten counties; § 9—provides varying methods of selecting jury panels in several counties. "It has long been the practice of the Maryland Legislature either to enact local laws or to exempt particular counties from the operation of general laws." *Neuenschwander* v. *Washington Suburban Sanitary Commission*, 187 Md. 67, 80, 48 A. 2d 593, 600; *Stevens* v. *Maryland*, 89 Md. 669, 674, 43 A. 929, 931. Cf. *Maryland Coal & Realty Co.* v. *Bureau of Mines*, 193 Md. 627, 69 A. 2d 471.

ness of such centrally enacted legislation as compared with the variations which may result from home rule is a matter for legislative discretion, not judicial supervision, except where there is a clear conflict with constitutional limitations. We find no such conflict here.

The presumption of reasonableness is with the State.[9] While the burden of establishing the reasonableness of the legislation was not on him, the Attorney General of Maryland has suggested here several considerations bearing appropriately upon the action of the General Assembly. Maryland lies largely between the metropolitan centers of Baltimore, in Maryland, and of Washington, in the District of Columbia. Between them are Anne Arundel County, adjoining Baltimore, and Prince George's County, adjoining Washington. In Anne Arundel lies Annapolis, the capital of the State, and considerable rural territory. Those locations suggest that, in matters related to concentrations of population, the state government might well find reason to prescribe, at least on an experimental basis, substantive restrictions and variations in procedure that would differ from those elsewhere in the State. Criminal law provides a long-established field for such legislative discretion.[10] In this

[9] ". . . It is . . . a maxim of constitutional law that a legislature is presumed to have acted within constitutional limits, upon full knowledge of the facts, and with the purpose of promoting the interests of the people as a whole, and courts will not lightly hold that an act duly passed by the legislature was one in the enactment of which it has transcended its power." *Atchison, T. & S. F. R. Co.* v. *Matthews*, 174 U. S. 96, 104. "A statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it." *Metropolitan Casualty Ins. Co.* v. *Brownell*, 294 U. S. 580, 584. See also, *Middleton* v. *Texas Power & Light Co.*, 249 U. S. 152, 157–158; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78–79.

[10] *Metropolitan Casualty Ins. Co.* v. *Brownell*, *supra*. The State is not bound "to strike at all evils at the same time or in the same way." *Semler* v. *Oregon Dental Examiners*, 294 U. S. 608, 610.

connection, the Attorney General referred specifically to an increase in gambling activity in Anne Arundel County which he attributed in part to a policy adopted by the Criminal Court of Baltimore in imposing maximum prison sentences for gambling offenses, thus tending to drive gambling operations into adjoining areas. He suggested, as a justification for a legislative distinction between prosecutions for violations of state lottery laws and of the gambling laws here specified, that the former were of a more readily detected and easily proved character than the latter.

We find no merit in the suggestion of appellant that the 1951 amendment to the Bouse Act affirmatively sanctions illegal searches and seizures in violation of the Due Process Clause of the Fourteenth Amendment. If the statute were so interpreted such a question might arise.[11] However, the Court of Appeals of Maryland has not so interpreted it and nothing in its text suggests approval of illegal searches and seizures. The Act offers to offending searchers and seizers no protection or immunity from anything—be it civil liability, criminal liability or disciplinary action.

We sustain the validity of the 1951 amendment to the Bouse Act and the judgment of the Court of Appeals of Maryland, accordingly, is

Affirmed.

MR. JUSTICE REED took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS, dissenting.

I am still of the view, expressed on other occasions (see *Wolf* v. *Colorado*, 338 U. S. 25, 40–41; *Schwartz* v.

[11] ". . . we have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment." *Wolf* v. *Colorado*, 338 U. S. 25, 28.

Texas, 344 U. S. 199, 205), that the Fourteenth and the Fourth Amendments preclude the use in any criminal prosecution of evidence obtained by the lawless action of police officers who, in disregard of constitutional safeguards, ransack houses or places of business without search warrants issued under the strict surveillance which the Constitution commands.

MADRUGA *v.* SUPERIOR COURT OF CALIFORNIA, IN AND FOR THE COUNTY OF SAN DIEGO.

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 35. Argued October 19–20, 1953.—Decided January 18, 1954.

Eight individuals who owned undivided interests aggregating 85% in a ship which was certificated under the maritime laws of the United States, instituted a proceeding in a California state court at San Diego, the home port of the vessel, for sale of the vessel and partition of the proceeds pursuant to a California statute. The defendant was an individual who owned a 15% interest in the vessel, and personal service was had upon him by summons. The state court's decision that it had jurisdiction was upheld by the State Supreme Court which declined to issue a writ of prohibition. *Held:*

1. Under the federal admiralty power, United States District Courts have jurisdiction to order vessels sold for partition. Pp. 557–560.

2. The jurisdiction of the federal courts was not exclusive; and the California court was "competent" to give this partition remedy and had jurisdiction of the cause of action. Pp. 560–561.

(a) The federal admiralty jurisdiction is "exclusive" only as to those maritime causes of action begun and carried on as proceedings *in rem;* and the proceedings in this partition case were not *in rem* in the admiralty sense. Pp. 560–561.

(b) The state court in this proceeding acts only upon the interests of the parties over whom it has jurisdiction *in personam,* and it does not affect the interests of others in the world at large, as it would if this were a proceeding to enforce a lien. P. 561.

3. The California court's taking of jurisdiction of this partition suit at the instance of the majority shipowners does not run counter to any established rule of admiralty; nor do the circumstances justify the establishment of a national judicial rule controlling partition of ships. Pp. 561–564.

4. The State Supreme Court's refusal to issue a writ of prohibition was a final judgment reviewable here under 28 U. S. C. § 1257. P. 557, n. 1.

40 Cal. 2d 65, 251 P. 2d 1, affirmed.

Eli H. Levenson argued the cause and *Thomas M. Hamilton* filed a brief for petitioner.

Northcutt Ely argued the cause for respondent. With him on the brief was *Robert L. McCarty*. *Herbert Kunzel* filed an appearance for respondent.

MR. JUSTICE BLACK delivered the opinion of the Court.

This case for sale of a vessel and partition of the proceeds pursuant to a California statute began in the Superior Court of San Diego, the home port of the vessel. The plaintiffs were eight individuals including Edward, Anthony, and Joseph Madruga. The defendant was Manuel Madruga on whom personal service was had by summons. The defendant owned a 15% interest and the eight plaintiffs owned undivided interests aggregating 85% in a ship certificated under the maritime laws of the United States. The defendant 15% owner challenged the jurisdiction of the San Diego court on the ground that only the United States district court sitting in admiralty could take jurisdiction to consider such a case. The San Diego court decided it had jurisdiction and was upheld by the State Supreme Court which declined to issue a writ of prohibition.[1] 40 Cal. 2d 65, 251 P. 2d 1. Certiorari was granted to consider the state court's jurisdiction. 345 U. S. 963.

First. Article III, § 2, of the Constitution extends the judicial power to "all Cases of admiralty and maritime Jurisdiction. . . ." And since the first Judiciary Act, United States district courts have had jurisdiction of all civil cases of "admiralty or maritime jurisdiction . . . ." 28 U. S. C. § 1333. Whether this grants United States

[1] The State Supreme Court's judgment finally disposing of the writ of prohibition is a final judgment reviewable here under 28 U. S. C. § 1257.

district courts power to sell ships for partition of the proceeds has never been squarely decided by this Court. The partition power of admiralty was discussed but left in doubt by Mr. Justice Story in *The Steamboat Orleans* v. *Phoebus*, 11 Pet. 175, 183 (1837).[2] Some cases in lower federal courts appear to support the jurisdiction of district admiralty courts to order sales for partition, at least where there is a dispute as to use of the ship between part owners having equal interests and shares.[3] Other cases indicate that admiralty should not exercise jurisdiction to order partition of ships at the instance either of minority or majority interests.[4] The reasoning in all the

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[2] "The jurisdiction of courts of admiralty in cases of part owners, having unequal interests and shares, is not, and never has been applied to direct a sale, upon any dispute between them as to the trade and navigation of a ship engaged in maritime voyages, properly so called. The majority of the owners have a right to employ the ship in such voyages as they may please; giving a stipulation to the dissenting owners for the safe return of the ship; if the latter, upon a proper libel filed in the admiralty, require it. And the minority of the owners may employ the ship in the like manner, if the majority decline to employ her at all. So the law is laid down in Lord Tenterden's excellent Treatise on Shipping. Abbot on Ship. part 1, chap. 3, sec. 4 to sec. 7. If, therefore, this were a vessel engaged in maritime navigation, the libel for a sale could not be maintained."

Some have thought that Mr. Justice Story here rejected the idea of admiralty jurisdiction to sell ships for partition. But, however that may be, he made it clear in his book on partnership that he believed admiralty courts did have such jurisdiction. Story, Partnership (1st ed. 1841), § 439, n. 1.

[3] *E. g.*, *The Seneca*, Fed. Cas. No. 12,670 (C. C. E. D. Pa. 1829); *The Emma B.*, 140 F. 771 (D. C. D. N. J. 1906). Compare discussion in *Davis* v. *The Seneca*, Fed. Cas. No. 3,650 (D. C. E. D. Pa. 1828) rev'd, *The Seneca*, *supra*.

[4] *E. g.*, *Lewis* v. *Kinney*, Fed. Cas. No. 8,325 (C. C. E. D. Mo. 1879); *The Red Wing*, 10 F. 2d 389 (D. C. S. D. Cal. 1925); see *Coyne* v. *Caples*, 8 F. 638, 639–640 (D. C. D. Ore. 1881); *Fischer* v. *Carey*, 173 Cal. 185, 189–192, 159 P. 577, 578–580 (1916).

cases appears to have been that majority control of the ship's operations was in the public interest and admiralty should interfere only to protect minority interests by such special indemnities or bonds as the court might require of the controlling majority. Other cases have indicated that either a majority or a minority could obtain partition from admiralty on a proper showing.[6] Some state courts have sold ships for partition,[8] and even at the behest of minority interests;[7] others have refused to do so.[8] However the diverse holdings in the cases may be viewed,[9] there can be no doubt today that United States district courts have broad power over ships that ply navigable waters and are required to be registered or enrolled under a series of Acts of Congress that have been in effect since the first one was passed September 1, 1789.[10] 1 Stat. 55. This Court has said that admiralty's broad power can under some circumstances be extended to protect the rights and title of persons dealing in such ships. *White's Bank* v. *Smith*, 7 Wall. 646, 656. On the other hand, the Court has held that admiralty cannot exercise jurisdiction over a variety of actions which may change or otherwise affect possession of or title to vessels. *The*

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[6] *Tunno* v. *The Betsina*, Fed. Cas. No. 14,236 (D. C. D. S. C. 1857).

[8] *E. g., Andrews* v. *Betts*, 8 Hun (N. Y.) 322 (1876); *Francis* v. *Lavine*, 26 La. Ann. 311 (1874).

[7] *Swain* v. *Knapp*, 32 Minn. 429, 21 N. W. 414 (1884); *Reynolds* v. *Nielson*, 116 Wis. 483, 93 N. W. 455 (1903).

[8] *E. g., Fischer* v. *Carey*, 173 Cal. 185, 159 P. 577 (1916); *Cline* v. *Price*, 39 Wash. 2d 816, 239 P. 2d 322 (1951).

[9] Citations to cases with these varied holdings are collected in Note 302, 28 U. S. C. A. § 1333, 90 Am. St. Rep. 378–380 and in L. R. A. 1917A, 1114–1116.

[10] In England King's Bench prohibited Admiralty's exercise of partition jurisdiction in *Ouston* v. *Hebden*, 1 Wils. K. B. 101, 95 Eng. Rep. 515 (1745). However, jurisdiction, which extended even to minority share owners, was later given to admiralty by statute. The Admiralty Court Act, 1861, 24 Vict., c. 10, § 8.

Steamer Eclipse, 135 U. S. 599, 608.[11] We think, however, that the power of admiralty, as Congress and the courts have developed it over the years, is broad enough for United States district courts to order vessels sold for partition. This brings us to the contention that this federal admiralty power is exclusive.

Second. Had Congress simply granted district courts "admiralty or maritime jurisdiction exclusive of the states" California might not have power to order partition of a ship. But Congress did not stop there. It went on in the first Judiciary Act to say "saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." 1 Stat. 73, 77.[12] Viewed superficially the clause giving United States district courts exclusive admiralty or maritime jurisdiction appears inconsistent with the clause which permits persons to sue on maritime claims in common law courts. But former decisions of this Court have clarified this seeming conflict. Admiralty's jurisdiction is "exclusive" only as to those maritime causes of action begun and carried on as proceedings *in rem*, that is, where a vessel or thing is itself treated as the offender and made the defendant by name or description in order to enforce a lien. See, *e. g.*, *The Moses Taylor*, 4 Wall. 411, 427; *The Resolute*, 168 U. S. 437, 440–441. It is this kind of *in rem* proceeding which state courts cannot entertain. But the jurisdictional act does leave state courts "competent" to adjudicate maritime causes of action in proceedings "*in personam*," that is, where the defendant is a per-

[11] For applications of this decision, see, *e. g.*, *The Guayaquil*, 29 F. Supp. 578 (D. C. E. D. N. Y. 1939); *Hirsch* v. *The San Pablo*, 81 F. Supp. 292 (D. C. S. D. Fla. 1948).

[12] The 1948 and 1949 revisions of 28 U. S. C. § 1333 amended the above clause. It now reads: ". . . saving to suitors in all cases all other remedies to which they are otherwise entitled." We take it that this change in no way narrowed the jurisdiction of the state courts under the original 1789 Act.

son, not a ship or some other instrument of navigation. *Rounds* v. *Cloverport Foundry & Machine Co.*, 237 U. S. 303, 306–309. Aside from its inability to provide a remedy *in rem* for a maritime cause of action, this Court has said that a state, "having concurrent jurisdiction, is free to adopt such remedies, and to attach to them such incidents, as it sees fit" so long as it does not attempt to make changes in the "substantive maritime law." *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109, 124.

The proceedings in this California partition case were not *in rem* in the admiralty sense. The plaintiffs' quarrel was with their co-owner, not with the ship. Manuel Madruga, not the ship, was made defendant. Thus the state court in this proceeding acts only upon the interests of the parties over whom it has jurisdiction *in personam*, and it does not affect the interests of others in the world at large, as it would if this were a proceeding *in rem* to enforce a lien. The California court is "competent" to give this partition remedy and it therefore has jurisdiction of the cause of action.

Third. Petitioner contends that for the California court to entertain this partition suit at the instance of the majority shipowners would run counter to an admiralty rule which is said to permit sales for partition only as between equal interests. Such a national admiralty rule would bind the California court here, even though it has concurrent jurisdiction to grant partition. See *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239; *Butler* v. *Boston S. S. Co.*, 130 U. S. 527, 557–558. Congress has passed detailed laws regulating the shipping industry with respect to ownership, sales, mortgages and transfers of vessels.[13] It has even prescribed special rules for ship

[13] Title 46 U. S. C. In particular see: § 11, limiting United States ship registration to ships owned by United States citizens or United States corporations having only citizens as officers (from Act of Dec. 31, 1792, c. 1, § 2, 1 Stat. 288); § 25, prescribing a form for registra-

registration after their judicial sale.[14] But Congress has never seen fit to bar states from making such sales, or to adopt a national partition rule.[15] Nor has any such rule been established by decisions of this Court. And as pointed out above, decisions of lower federal courts and of state courts show varying ideas as to what kind of partition rule should be adopted if any. We do not think the circumstances call on us to add to congressional regulation by attempting establishment of a national judicial rule controlling partition of ships. See *Kelly* v. *Washington*, 302 U. S. 1, 9–14. Cf. *Cooley* v. *Board of Wardens*, 12 How. 299.

The scarcity of reported cases involving such partition since the Constitution was adopted indicates that establishment of a national partition rule is not of major importance to the shipping world. We can foresee at this

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tion which requires detailed information as to the ship's description, its builders, and the identity and proportion of ownership of all its owners (from Act of Dec. 31, 1792, c. 1, § 9, 1 Stat. 291); § 39, requiring new registration upon any sale or alteration of a ship (from Act of Dec. 31, 1792, c. 1, § 14, 1 Stat. 294); § 808, placing restrictions on the sale to aliens of vessels owned by a United States citizen or corporation (from Act of Sept. 7, 1916, c. 451, § 9, 39 Stat. 730, as amended by Act of July 15, 1918, c. 152, § 3, 40 Stat. 900); § 921, providing that no sale, conveyance or mortgage of a vessel of the United States shall be valid against one other than the grantor or mortgagor, his heirs or persons with notice, until recorded (from Act of June 5, 1920, c. 250, § 30, 41 Stat. 1000).

[14] 46 U. S. C. § 34 provides for registration of vessels sold under process of law where the former owner retains the ship's registration, upon the new owner's meeting the legal requirements for registry (from Act of Mar. 2, 1797, c. 7, 1 Stat. 498).

[15] It is noteworthy that Congress has explicitly placed partition actions under federal jurisdiction only where the United States is a tenant, 28 U. S. C. §§ 1347, 2409. Partition of real estate belonging to Oklahoma Indians has been made subject to state laws, 25 U. S. C. § 355.

time no possible injury to commerce or navigation if states continue to be free to follow their own customary partition procedures. Easily accessible local courts are well equipped to handle these essentially local disputes. Ordering the sale of property for partition is part of their everyday work. Long experience has enabled states to develop simple legislative and judicial partition procedures with which local judges and counsel are familiar. Federal courts have rarely been called on to try such disputes and have established no settled rules for partition. In some parts of the country the inaccessibility of federal courts as compared with state courts would cause needless expense and inconvenience to parties. We have no reason to believe federal procedure if applied to partition cases would be simpler, speedier, less expensive or fairer than the procedures of state courts. Nor are we convinced that any theoretical benefits to shipping would justify us in restricting the partition jurisdiction of state courts by fashioning an exclusive national rule to govern quarreling shipowners. Cf. *Halcyon Lines* v. *Haenn Ship Ceiling Corp.*, 342 U. S. 282, 285–287. State laws making partition easily available, like state pilotage laws, see *Cooley* v. *Board of Wardens*, 12 How. 299, may well help fill the needs of a vigorous commerce and navigation.[16] Since the absence

[16] "The rule of the civil as of the common law, that no one should be compelled to hold property in common with another, grew out of a purpose to prevent strife and disagreement: Story's Eq. sec. 648; and additional reasons are found in the more modern policy of facilitating the transmission of titles and in the inconvenience of joint holding." *Caldwell* v. *Snyder*, 178 Pa. 420, 422, 35 A. 996. ". . . [P]artition is a right much favored, upon the ground that it not only secures peace, but promotes industry and enterprise, that each should have his own." *Cannon* v. *Lomax*, 29 S. C. 360, 371, 7 S. E. 529, 530.

of such a national rule has produced few difficulties over the years, it appears to us that it would be better to let well enough alone.

Affirmed.

MR. JUSTICE REED concurs in the judgment of the Court.

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE JACKSON joins, dissenting.

For one reason or another, eight co-owners having eighty-five percent interest in a vessel wished to terminate the enterprise but found the present petitioner, owner of the remaining fifteen percent, opposed to sale. Accordingly they asked a California State court for judicial sale of the vessel and appropriate distribution of the proceeds among all the owners. This is the only claim the plaintiffs made. There was no claim to enforce a personal right against the petitioner; no claim of any sort for which the levy on the ship as security was sought for some personal obligation owing from the petitioner. The jurisdiction of the State court was invoked exclusively for the sale of a vessel.

If this is not an action against the thing, in the sense in which that has meaning in the law, then the concepts of a *res* and an *in rem* proceeding have an esoteric meaning which I do not understand. From the terms of the complaint for partition through the opinion of this Court authorizing the State court to grant it, there is not the remotest suggestion that we are dealing with a remedy to enforce a separate underlying personal claim. Here the ship's the thing—not a claim outside the ship for which an ancillary remedy against the ship is sought. Cf. *Knapp, Stout & Co.* v. *McCaffrey*, 177 U. S. 638. Is it to be doubted that if California procedure required the proceeding to be brought by name against the Oil Screw

Vessel Liberty, Official No. 256332, or if the action had in fact been so entitled, it would inescapably be deemed an action *in rem?* To make the existence of State power depend on such tenuous formalities is to make questions of jurisdiction in matters maritime, as between federal and State courts, turn on distinctions much too frail.

Of course State courts are free to give the relief here sought, if admiralty has not jurisdiction of a libel for partition. State law would then not be encroaching upon the admiralty jurisdiction of the federal courts. Whether admiralty has such jurisdiction, except when the contest over the use of the vessel is between owners whose interest is equally divided, has not been adjudicated by this Court, and the learning on the subject is not compelling. The problem has received its fullest consideration in *Fischer* v. *Carey*, 173 Cal. 185, 159 P. 577 (1916), and substantially on the basis of arguments there elaborated, I conclude that admiralty does have jurisdiction in the circumstances of this case. The nub of the holding of that case is that "the jurisdiction of the courts of the United States in admiralty is full and complete touching the matter of sale under the circumstances here indicated, that is to say, where dissentient owners are at strife over the use to be made of the ship; for it must, from the nature of admiralty jurisdiction, be a fundamental part of that jurisdiction to exercise control over the *rem*—the ship itself." 173 Cal., at 198, 159 P., at 582.[1]

The Supreme Court of California in sustaining the State's power which it had denied in *Fischer* v. *Carey* did not overrule that case. It reached the result it did, because it found that the "saving clause," descended from the First Judiciary Act, 1 Stat. 73, 77, had been drastically modified by the 1948 revision of the Judicial Code. 28

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[1] *Fischer* v. *Carey* was recently followed in *Cline* v. *Price*, 39 Wash. 2d 816, 239 P. 2d 322 (1951).

U. S. C. § 1333.[3] The Reviser's Notes completely refute this view. And since this Court does not adopt the construction given § 1333 by the California Supreme Court, the argument against it need not be elaborated.

Once it is established that the federal courts have jurisdiction and that the remedy here sought in a State court has "all the essential features of an admiralty proceeding *in rem*," *The Hine* v. *Trevor*, 4 Wall. 555, 571, the disposition of this case is clearly controlled by decisions of this Court. They were thus summarized in an opinion for the Court by Mr. Justice Brandeis, than whom no member of this Court gave wider scope to concurrent State jurisdiction in maritime matters: "A State may not provide a remedy *in rem* for any cause of action within the admiralty jurisdiction." *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109, 124.

From the admiralty clause of the Constitution, this Court has drawn probably greater substantive law-making powers than it exercises in any other area of the law. See, *e. g.*, *The Osceola*, 189 U. S. 158. Broad as are the implications of this clause, it does not authorize this Court to decide as a matter of policy, wholly untrammeled by the historic roots of admiralty, what relief may be sought exclusively in the federal admiralty courts and what may be concurrently given by the State courts. It is significant that the need for a body of maritime law, applicable throughout the Nation and not left to the diversity of the several States, was the one basis for the creation of a system of inferior federal courts, authorized by the Constitution, which was recognized by every shade of opinion at the Philadelphia Convention.

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[3] The original "saving clause" read: "saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." 28 U. S. C. § 1333 now reads: "saving to suitors in all cases all other remedies to which they are otherwise entitled."

Were Congress to authorize the States to exercise jurisdiction for the partition of vessels, we would of course have a very different question than the one now before us, the more so because one may assume that such a statute would differentiate between small craft plying within a limited area and ocean-going vessels. This Court cannot on its own initiative make such differentiations, regarding the power of State courts, as between small vessels and large. Whatever power may be exercised by Congress in ceding national maritime jurisdiction to the States, it is not for this Court to allow State courts to have concurrent jurisdiction *in rem*, solely because the "establishment of a national partition rule is not of major importance to the shipping world."

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UNITED STATES *v.* LINDSAY ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 94. Argued December 1–2, 1953.—Decided January 18, 1954.

Section 4 (c) of the Commodity Credit Corporation Charter Act of June 29, 1948, as amended, 15 U. S. C. § 714b (c), bars suits by or against the Corporation unless brought "within six years after the right accrued on which suit is brought." The Government sued these private parties in 1952 to recover on a claim growing out of the alleged delivery of damaged wool to the Corporation in 1945. *Held:* The Government's claim "accrued" on the date a right to sue came into existence, rather than on the date the Act became effective, and the suit is barred. Pp. 568–571.

202 F. 2d 239, affirmed.

Paul A. Sweeney argued the cause for the United States. With him on the brief were *Acting Solicitor General Stern, Assistant Attorney General Burger* and *Melvin Richter.*

Edward C. Park argued the cause and filed a brief for respondents.

MR. JUSTICE BLACK delivered the opinion of the Court.

On February 29, 1952, the United States filed the complaint in this case against Lindsay and the other respondents alleging that on February 26, 1945, Lindsay had delivered damaged wool to the Government in violation of an agreement with the Commodity Credit Corporation, a wholly owned corporate agency of the United States. The defendants moved to dismiss on the ground that the Government's seven year old claim was barred by the six year time limit in § 4 (c) of a 1948 Act as amended.[1] That section provides that "No suit by or

[1] 62 Stat. 1070, as amended, 63 Stat. 154, 156; 15 U. S. C. (Supp. V) § 714b (c).

against the Corporation shall be allowed unless . . . it shall have been brought within six years after the right accrued on which suit is brought . . . ." Holding that the 1952 suit was barred because the right to sue had "accrued" in 1945 when the damaged wool was delivered, the District Court dismissed the case. 105 F. Supp. 467. The Court of Appeals for the First Circuit affirmed on the same ground. 202 F. 2d 239. However, the Court of Appeals for the Sixth Circuit has held that a Government claim arising prior to the 1948 Act "accrued" not when the suit arose but when the Act became effective. *Field Packing Co.* v. *United States*, 197 F. 2d 329. This conflict among the circuits as to the statutory meaning of "accrued" led us to grant certiorari. 346 U. S. 810. The question here is whether Government claims growing out of the Corporation's transactions prior to the Act "accrued" on the date a right to sue came into existence or on the date the Act became effective.

In common parlance a right accrues when it comes into existence as the Government's claim against Lindsay did in 1945. Giving "accrued" its normal meaning would therefore bar all claims not sued on within six years from the date they arose whether they came into existence before or after passage of the Act. The Government admits that the normal meaning of "accrued" controls when the 1948 Act is applied prospectively, that is, to claims arising after the Act's effective date. But construing the Act in a way that requires its six year limitation period to begin before 1948 gives the law a retroactive effect, shortening the time for suit on some prior claims and summarily cutting off others. To prevent retroactivity we are urged to depart from the normal meaning of "accrued" when § 4 (c) is applied to preexisting claims. This suggested departure is no minor one. We are asked to read the words "six years after

the right accrued" as though Congress intended to say "six years after the effective date of the Act when it is applied to pre-existing causes of action." Precedents are cited in which, to avoid retroactive barring of suits, courts have refused to give "accrued" its normal meaning and have instead given it a special meaning—the date a new statute of limitations becomes effective. In effect, it is argued that these court decisions have made "accrued" a word of art when used in such statutes. Therefore, we are asked to hold that Congress used "accrued" in § 4 (c) with this special meaning.

It is true that courts have sometimes given "accrued" the meaning the Government here suggests, but we are unable to agree that the word has thereby taken on an established technical meaning which Congress must have had in mind when it used "accrued" in this Act. The legislative history fails to show that such a meaning was suggested to Congress before the Act was passed. Moreover, many of the decisions that gave "accrued" this special meaning did so to avoid possible constitutional questions should the statutes be interpreted in a way that would destroy private rights. See, *e. g.*, *Sohn* v. *Waterson*, 17 Wall. 596. But no constitutional question is raised by applying this six year time limit to pre-existing claims of the Government. Congress has unquestioned power to bar recovery on Government claims if it sees fit. And we agree with the court below that we need not now decide whether § 4 (c) can be applied to pre-existing claims brought by private persons against the Government. But see *Lynch* v. *United States*, 292 U. S. 571, 581; *Cummings* v. *Deutsche Bank*, 300 U. S. 115, 119; *Addison* v. *Huron Stevedoring Corp.*, 204 F. 2d 88, 91-92.

The Government also urges that quite apart from constitutional considerations there are strong reasons why courts should, whenever possible, construe statutes so as

to avoid retroactivity. Cases are cited in which particular provisions have been deemed so inequitable and unfair when applied retrospectively that this Court has refused to impute to law-making bodies a purpose to bring about such results.[2] But we cannot say that any consequences of retroactive application of the time limit here call on us to hold that Congress did not intend this statute to take effect according to the natural meaning of its words. The Government has used the Commodity Credit Corporation in business transactions since 1933. Probably many claims have accrued in the intervening years. Maybe others, like this one, are for comparatively small amounts. All, whether large or small, could have been sued on as they arose. We think that Congress might well have believed it wise to bar all stale claims by the Government against its agents and others who dealt with it in the past. For and against such a view arguments can be made that are based on common notions of fairness and justice. In this situation it seems better to leave this statutory problem with Congress rather than for us to stretch the word "accrued" beyond its ordinary meaning. Cf. *Chase Securities Corp.* v. *Donaldson*, 325 U. S. 304, 316.

Affirmed.

MR. JUSTICE REED, dissenting.

An emphasis by dissent upon the Court's departure from precedents of statutory construction will not be useless if it arouses the attention of statutory draftsmen

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[2] *United States* v. *Heth*, 3 Cranch 399; *Claridge Apartments Co.* v. *Commissioner*, 323 U. S. 141; *Hassett* v. *Welch*, 303 U. S. 303; *Brewster* v. *Gage*, 280 U. S. 327; *United States* v. *Magnolia Co.*, 276 U. S. 160; *United States* v. *St. Louis, S. F. & T. R. Co.*, 270 U. S. 1; *Shwab* v. *Doyle*, 258 U. S. 529; *Union Pacific R. Co.* v. *Laramie Stock Yards Co.*, 231 U. S. 190; *United States Fidelity & Guaranty Co.* v. *Struthers Wells Co.*, 209 U. S. 306; *Lewis* v. *Lewis*, 7 How. 776.

to the necessity of more explicit language to protect government claims.

Prior to the passage of the Act in question, a Delaware corporation of the same name as the federal agency created by the Commodity Credit Corporation Charter Act of 1948 existed and operated. 15 U. S. C. (Supp. III) § 713. It had claims and obligations which were unaffected by their transfer to the present corporation by the Charter Act. The earlier Delaware corporation was a wholly owned agency of the United States without statutory limitation, state or federal, on its right to sue upon its claims. *United States* v. *Summerlin*, 310 U. S. 414, and cases cited. Therefore, up to the time of the enactment of § 4 (c), 15 U. S. C. (Supp. III) § 714b (c), there was no compelling reason, beyond the desire for prompt and proper administration, for the United States to file its suits.

As the corporation had played a major part since its organization in 1933 in the purchase, storage and financing of American agricultural products, large claims had accumulated in its favor and against it over the years. S. Rep. No. 1022, 80th Cong., 2d Sess. If the problem here presented was *res integra*, the existence of old claims, not then barred by limitation, would lead me to interpret the words, "brought within six years after the right accrued,"* as prospective only to avoid imputing to Congress unreasonable and arbitrary destruction of valid claims for and against the corporation. This conclusion would follow from the principle that statutes of limitation "must receive a strict construction in favor of the Government." *DuPont de Nemours & Co.* v. *Davis*, 264 U. S. 456, 462; *Independent Coal Co.* v. *United States*, 274 U. S. 640, 650.

*It was four years in the 1948 Act, 62 Stat. 1070.

Other principles, it seems to me, necessitate this conclusion. Senator Aiken, Chairman of the subcommittee in charge of the bill, its floor manager and the senior Senate conferee, recorded his view in a statement published after the Congress adjourned.

> "With respect to claims by the Corporation, the 4-year period of limitations will not begin to run on claims of the Delaware Corporation transferred to the Federal Corporation until June 30, 1948, the effective date of the new charter." 94 Cong. Rec. A4409.

The precedents in this Court on the interpretation of statutes establishing limitations by the definition of "accrued" without exception give the word prospective meaning. See, *e. g.*, *United States* v. *St. Louis, S. F. & T. R. Co.*, 270 U. S. 1; *Fullerton-Krueger Co.* v. *Northern Pacific R. Co.*, 266 U. S. 435; *Sohn* v. *Waterson*, 17 Wall. 596; *Lewis* v. *Lewis*, 7 How. 776.

In the light of these purposes and precedents, viewed in the setting of damage to and pilferage of stored crops, the judgment of the Court of Appeals should be reversed.

CHICAGO, ROCK ISLAND & PACIFIC RAILROAD CO. *v.* STUDE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 209. Argued December 2–3, 1953.—Decided January 18, 1954.

An administrative condemnation proceeding instituted by petitioner under an Iowa statute resulted in a commission's award of $23,000 damages to the landowner. The statute provides for an appeal from the commission's award to a state court. Petitioner filed a complaint in the Federal District Court, alleging diversity of citizenship, and praying that the damages for the taking of the land be fixed at not more than $10,000. Petitioner also filed an appeal in the state court, where, as required by Iowa law, the case was docketed with the landowner as plaintiff and the petitioner as defendant. Thereafter petitioner filed a petition to remove the state court proceeding to the federal court. Respondents filed in the Federal District Court a motion to dismiss the complaint filed therein and a motion to remand the case removed from the state court. *Held:*

1. The case removed from the state court was properly ordered remanded to that court. Pp. 578–580.

(a) In the circumstances of this case, an order denying a motion to remand is reviewed, although the order would not be appealable if it stood alone. P. 578.

(b) Within the meaning of 28 U. S. C. § 1441 (a), petitioner was plaintiff and not "defendant" in the state court proceeding, and therefore was not authorized to remove that proceeding to the Federal District Court. Pp. 578–580.

(c) For the purpose of removal, the federal law determines who is plaintiff and who is defendant; and the procedural provisions of the state law are not controlling. P. 580.

2. The original complaint in the Federal District Court was properly dismissed. Pp. 580–582.

(a) Petitioner's complaint in the Federal District Court was an attempt to have that court review the state proceedings on appeal. Iowa law does not purport to authorize such an appeal, Congress has provided none by statute, and the Federal Rules of Civil Procedure make no such provision. Pp. 580–582.

(b) The complaint in the Federal District Court did not invoke the jurisdiction of that court in an eminent domain proceeding. P. 582.

(c) The question whether petitioner could proceed by way of an original action in the United States District Court for the Southern District of Iowa is not here presented or decided. P. 582.

204 F. 2d 116, 954, affirmed.

Alden B. Howland and *B. A. Webster, Jr.* argued the cause for petitioner. *Mr. Howland* also filed a brief for petitioner.

Raymond A. Smith and *Harold W. Kauffman* argued the cause for respondents. With them on the brief were *Daniel J. Gross, Philip J. Willson* and *John M. Peters.*

MR. JUSTICE MINTON delivered the opinion of the Court.

The petitioner, a Delaware corporation, owns and operates its railroad through Pottawattamie County, Iowa. It was authorized by the Interstate Commerce Commission to improve its line of railway in that county and by the Iowa State Commerce Commission to acquire by condemnation any land necessary for the improvement.

On January 18, 1952, pursuant to the Iowa Code,[1] the petitioner filed with the sheriff of the county its application to condemn certain lands in the county owned by respondent Stude. The sheriff appointed a commission

[1] "471.6 Railways. Any railway, incorporated under the laws of the United States or of any state thereof, may acquire by condemnation or otherwise so much real estate as may be necessary for the location, construction, and convenient use of its railway. . . .

"472.3 Application for condemnation. Such proceedings shall be instituted by a written application filed with the sheriff of the county in which the land sought to be condemned is located. . . .

"472.4 Commission to assess damages. The sheriff shall thereupon, except as otherwise provided, appoint six resident freeholders of his

of six resident freeholders to assess damages. Notice was given by the sheriff to the respondent owner and others interested in the land, and an award of damages in the sum of $23,888.60 was allowed to the owner and $1,000 to the tenant. The amount of the assessment was paid by the petitioner to the sheriff and the petitioner took possession of the land.[2] Such appraisal became final unless appealed from.

On March 6, 1952, the petitioner filed with the sheriff of the county a notice of appeal from the commission's award. The Iowa Code provides for appeal as follows:

> "472.18 Appeal. Any party interested may, within thirty days after the assessment is made, appeal therefrom to the district court, by giving the adverse party, his agent or attorney, and the sheriff, written notice that such appeal has been taken.
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> . . . . . .
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> "472.21 Appeals—how docketed and tried. The appeal shall be docketed in the name of the owner of the land, or of the party otherwise interested and appealing, as plaintiff, and in the name of the applicant for condemnation as defendant, and be tried as in an action by ordinary proceedings." Code of Iowa, 1950.

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county, none of whom shall be interested in the same or a like question, who shall constitute a commission to assess the damages to all real estate desired by the applicant and located in the county." Code of Iowa, 1950.

[2] "472.25 Right to take possession of lands. Upon the filing of the commissioners' report with the sheriff, the applicant may deposit with the sheriff the amount assessed in favor of a claimant, and thereupon the applicant shall, except as otherwise provided, have the right to take possession of the land condemned and proceed with the improvement. No appeal from said assessment shall affect such right, except as otherwise provided." Code of Iowa, 1950.

The petitioner then filed a complaint in the United States District Court for the Southern District of Iowa against the respondents in which it alleged diversity of citizenship, jurisdictional amount, authority to make improvements and to condemn therefor, together with a description of the land and that respondent Stude was the owner, and that the assessment proceedings had been instituted in the sheriff's office, resulting in the assessment of damages of $23,888.60, which was alleged to be excessive, and that appeal was taken by notice duly given. This notice was referred to as Exhibit A to the complaint, which exhibit recited that the appeal was taken to the Federal District Court for the Southern District of Iowa, and a transcript of the sheriff's proceeding was filed in that court. The prayer was that the damages for the taking of the land be fixed at not more than $10,000. On this complaint, a summons was issued and served upon the respondents.

The petitioner also filed an appeal from this assessment in the state court, the District Court for Pottawattamie County. The case was docketed there with the landowner as the plaintiff and the petitioner-condemnor as defendant, as required by the Iowa Code. Thereafter, a petition to remove the cause to the federal court was filed by the petitioner. The respondents filed in the Federal District Court a motion to dismiss the complaint filed therein and a motion to remand the case removed from the state court.

The federal court granted the motion to dismiss and dismissed the complaint but denied the motion to remand. The petitioner appealed from the judgment dismissing its complaint. The respondents gave notice of appeal from the order of the District Court denying the motion to remand. The Court of Appeals affirmed the District Court's judgment dismissing the complaint and

reversed the District Court's denial of the motion to remand, and ordered the cause remanded to the state court. 204 F. 2d 116, 204 F. 2d 954. We granted certiorari, 346 U. S. 810.

The Order Denying the Motion to Remand. Obviously, such an order is not final and appealable if standing alone. *Reed* v. *Lehman*, 91 F. 2d 919; *Miller* v. *Pyrites Co.*, 71 F. 2d 804. While these two cases were separate actions pending on the docket of the Federal District Court, they both involve the same subject and they were treated by the parties, the District Court and the Court of Appeals as if the dismissal appealed from and the order in the removal case were made in one case. Treating them as one case, the cross-error, challenging the order denying the motion to remand, may be considered as assigned in a case involving an appealable order, the order dismissing the complaint and the action. This is true despite the fact that the order denying the motion to remand standing alone would not be appealable. *Deckert* v. *Independence Shares Corp.*, 311 U. S. 282, 287.

We come therefore to the merits of the motion to remand. The question on this motion is whether the petitioner was a defendant nonresident of Iowa and therefore authorized to remove to the Federal District Court as provided by statute, 28 U. S. C. § 1441 (a).

The proceeding before the sheriff is administrative until the appeal has been taken to the district court of the county. Then the proceeding becomes a civil action pending before "those exercising judicial functions" for the purpose of reviewing the question of damages. *Myers* v. *Chicago & N. W. R. Co.*, 118 Iowa 312, 315–316, 91 N. W. 1076, 1078. When the proceeding has reached the stage of a perfected appeal and the jurisdiction of the state district court is invoked, it then becomes in its nature a civil action and subject to removal by the

defendant to the United States District Court. *Boom Co.* v. *Patterson*, 98 U. S. 403, 407.[3]

Is the petitioner such a defendant? The petitioner contends it is because the Code of Iowa, § 472.21, provides that on appeal, the case shall be docketed in the district court with the landowner as the plaintiff and the condemnor as the defendant and thereafter tried as in an original proceeding. The Supreme Court of Iowa has construed this statute to mean that in such proceedings on appeal, the condemnor is the defendant. *Myers* v. *Chicago & N. W. R. Co.*, *supra*, at 324, 91 N. W., at 1081. This Court was urged in *Mason City R. Co.* v. *Boynton*, 204 U. S. 570, to follow that construction put upon this identical provision of the Iowa statute by the Supreme Court of Iowa. This Court declined to do so, saying:

> "It is said that this court is bound by the construction given to the state law by the state court. Indeed the above § 2009 does not need construction; it enacts, in terms, that the landowner shall be plaintiff. As the right to remove a suit is given only to the defendants therein, being non-residents of the State, it is argued that the state decision ends the case.
>
> "But this court must construe the Act of Congress regarding removal. And it is obvious that the word defendant as there used is directed toward more important matters than the burden of proof or the right to open and close. It is quite conceivable that a state enactment might reverse the names which for the purposes of removal this court might think the proper ones to be applied. In condemnation proceedings the words plaintiff and defendant can be used only

[3] In that case, the power of eminent domain was relied upon from beginning to end.

in an uncommon and liberal sense. The plaintiff complains of nothing. The defendant denies no past or threatened wrong. Both parties are actors: one to acquire title, the other to get as large pay as he can. It is not necessary in order to decide that the present removal was right to say that the state decision was wrong. We leave the latter question where we find it. . . .

. . . . . .

"Therefore, in a broad sense, the railroad is the plaintiff, as the institution and continuance of the proceedings depend upon its will. . . ." 204 U. S. 570, at 579–580.

For the purpose of removal, the federal law determines who is plaintiff and who is defendant. It is a question of the construction of the federal statute on removal, and not the state statute. The latter's procedural provisions cannot control the privilege of removal granted by the federal statute. *Shamrock Oil Corp.* v. *Sheets*, 313 U. S. 100, 104. Here the railroad is the plaintiff under 28 U. S. C. § 1441 (a) and cannot remove. The remand was proper.

The Motion to Dismiss. We think it was properly granted, and the original complaint in the Federal District Court correctly dismissed. The steps taken by the petitioner were those to perfect an appeal to the Federal District Court. The notice said it was the intention of the petitioner to docket the appeal in the federal court. The transcript on appeal was filed in the federal court, and the complaint filed sought a review of the commission's assessment of damages. The proceeding makes no sense on any other basis, for the action is brought not by the person injured, namely, the landowner, but by the railroad that inflicted the damage. It will be noticed further that there is no prayer for damages but only for

a review of the assessment, in keeping with the Iowa Code, § 472.23, which provides "no judgment shall be rendered except for costs . . . ." In short, it was an attempt of the petitioner to review the state proceedings on appeal to the Federal District Court.

The petitioner, after giving notice of appeal by filing notice with the sheriff, etc., could not perfect that appeal to any court but the court which the statute of Iowa directed, which was the District Court of that State for the County of Pottawattamie. The United States District Court for the Southern District of Iowa does not sit to review on appeal action taken administratively or judicially in a state proceeding. A state "legislature may not make a federal district court, a court of original jurisdiction, into an appellate tribunal or otherwise expand its jurisdiction . . . ." *Burford* v. *Sun Oil Co.*, 319 U. S. 315, 317. The Iowa Code does not purport to authorize such an appeal, Congress has provided none by statute, and the Federal Rules of Civil Procedure make no such provision.

We cannot ignore this plain attempt to appeal and treat the complaint as initiating an original action, as if the parties had agreed that the petitioner could take the land, leaving only a controversy as to the amount of compensation. In that instance, there would be an implied agreement that the petitioner would pay the landowner the fair value of the land. Either party might in that posture of the case ask for a declaration as to the amount of compensation owing. The claim for damages would arise in that case from the substantive rights given by the implied contract, and the suit would be one to enforce that contract. We have no such case here. The right to take the land and the ensuing right to damages here spring from the exercise of the power of eminent domain. The petitioner here seems to ignore the means by which it obtained the land and seeks to review only

the question of damages. It may not separate the question of damages and try it apart from the substantive right from which the claim for damages arose. Nor can it be said that petitioner has fully exercised its power of eminent domain, leaving nothing to be determined but the question of damages. Petitioner has possession but not title to the land. The land does not belong to the petitioner until the damages are paid. The sheriff, or the clerk of the state district court in case of appeal, must file in the county recorder's office all the papers filed in the proceeding. Code of Iowa, 1950, §§ 472.35, 472.36. The Iowa Code, § 472.41, makes this record presumptive evidence of title in the condemnor. Petitioner is still in the process of trying to get the land by virtue of its power of eminent domain. But obviously the complaint here was not filed to invoke the jurisdiction of the federal court in an eminent domain proceeding.

The Federal Rules of Civil Procedure do have elaborate provisions for procedure in the federal court in condemnation proceedings. It is obvious that the petitioner was not proceeding under these Rules. Whether it could so proceed as an original action in the United States District Court for the Southern District of Iowa is not before us.

The judgment is

Affirmed.

MR. JUSTICE JACKSON concurs in the result.

MR. JUSTICE BLACK, dissenting.

I think the railroad has a right to have its case tried in the United States District Court. Congress has given such courts power to try any case that is (1) a "civil" action, (2) between "Citizens of different States," (3) a "controversy," and (4) involves a matter which "exceeds the sum or value of $3,000 exclusive of interest and costs."

28 U. S. C. § 1332. If a complaint alleges these four things a district court has jurisdiction. Here the railroad's complaint shows all four. The case is plainly a "civil" action, not a criminal one. The railroad is a "citizen" of Delaware and the other parties are "citizens" of Iowa. There is a "controversy" about transferring title to property and how much the railroad must pay for it. And the dispute concerns more than $3,000—the owners want $23,888.60, the railroad is willing to pay only $10,000. The foregoing allegations were sufficient to establish and did establish district court jurisdiction. Other facts were also alleged. If these facts were relevant to nonjurisdictional issues they were properly alleged; if immaterial they could have been stricken. In any event, a court cannot lose its power to act merely because of unnecessary words. A point is made of the railroad's reference to certain prior state proceedings as though it had a right to "appeal" to the federal court from these proceedings. But assuming that the railroad confidently believed it had a right to appeal from the state commission, and therefore put a wrong label on its civil action, the District Court was still under a duty to try the case. After all, the railroad simply asked the court to fix damages for the property taken at "not to exceed $10,000," and for "such further relief as may be just and proper under the circumstances." And the pendency of a similar condemnation proceeding in the state court certainly did not destroy the federal court's jurisdiction. Nor did the District Court lose its jurisdiction because the railroad failed to invoke Rule 71A or to observe its procedure. In trying the case, the court should of course require observance of the Rule, if applicable, but failure of the railroad to comply with it is no sufficient reason for the court's refusal to settle the controversy. All of the alleged procedural mistakes attributed to the railroad could easily have been cured;

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none could possibly justify a final, unconditional dismissal of its cause of action. See *Bell* v. *Hood*, 327 U. S. 678; *Brown* v. *Western R. of Alabama*, 338 U. S. 294, 298–299, 303.

MR. JUSTICE FRANKFURTER, dissenting.

Stripped of irrelevant and beclouding elements, this is a suit brought in a federal court for the ascertainment of the value of land, acquired by eminent domain under the prescribed Iowa procedure.

If the Rock Island had decided to initiate this suit in the United States District Court for the Southern District of Iowa, as it was unquestionably entitled to do since there was diversity of citizenship, *Madisonville Traction Co.* v. *Mining Co.*, 196 U. S. 239, the procedure defined by the Iowa Code would, under Rule 71A (k) of the Rules of Civil Procedure, have had to be followed. For that Rule provides that in an eminent domain proceeding the state procedure for determination of the value of the condemned land by a jury or commission, or both, must be followed.[1] The sole difference, therefore, between the initiation of such an original condemnation proceeding in the federal court, regarding which no jurisdictional question could have been raised, and what was done here is that the railroad went directly to the sheriff's commissioners instead of having the District Court send it there, or itself employ the same kind of fact-finding procedure.

Once the sheriff's commissioners had found the value of the land, there came into operation the Iowa law au-

[1] "(k) CONDEMNATION UNDER A STATE'S POWER OF EMINENT DOMAIN. The practice as herein prescribed governs in actions involving the exercise of the power of eminent domain under the law of a state, provided that if the state law makes provision for trial of any issue by jury, or for trial of the issue of compensation by jury or commission or both, that provision shall be followed."

thorizing reconsideration of the amount by a court. This marks the beginning of the judicial phase of the proceedings, "appeal" though it loosely be called.[2] One is entitled to ask what considerations bar access at this point to the Federal District Court in Iowa "sitting . . . [as] a court of that State," *Madisonville Traction Co.* v. *Mining Co.*, *supra*, at 255, when all the statutory requirements for diversity jurisdiction are present. Can it be that there is something inexorable about the Iowa eminent domain procedure whereby it must run its full course in the Iowa courts, thus preventing the railroad from pursuing its first judicial remedy in the federal court of the State? But there is nothing in the Iowa Code or in the United States Judicial Code which ousts the federal court of its statutory jurisdiction simply because the Rock Island complied literally with the Iowa condemnation procedure.

Looked at from another aspect, this case may be seen simply as a suit for a declaration of money owed, satisfying the requirements of diversity jurisdiction. "The point in issue," in the language of *Boom Co.* v. *Patterson*, 98 U. S. 403, 407, is "the compensation to be made to the owner of the land; in other words, the value of the property taken. No other question was open to contestation in the District Court." As is spelled out in MR. JUSTICE BLACK'S opinion, with which I substantially agree, this case presents a dispute over some $13,000—only that and nothing more—and as such is within the scope of 28 U. S. C. § 1332.

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[2] As Chief Judge Gardner, dissenting on the rehearing below, pointed out, the fact that the Rock Island filed a "Notice of Appeal" as required by the Iowa Code does not affect this case. "The mere fact that the attempted appeal from the commissioners' award was not warranted and did not in itself confer jurisdiction, did not preclude the Rock Island from invoking the original jurisdiction of the Federal Court on the grounds set out in its original complaint." 204 F. 2d 954, 956.

I am not astute to find grounds for sustaining diversity jurisdiction. But while exercises in procedural dialectics so rampant in the early nineteenth century still hold for me intellectual interest, I do not think they should determine litigation in the middle of the twentieth, even when based merely on diversity of citizenship. I had supposed that the Rules of Civil Procedure for the district courts were to a considerable degree designed as a liberation from these wasteful and fettering niceties. The history of this litigation and its disposition will hardly be cited as an illustration of the fulfillment of the hope with which Congress allowed these Rules to take effect: "It is confidently expected that the adoption of the new rules will materially reduce the uncertainty, delay, expense, and the likelihood that cases may be decided on technical points of procedure which had no relation to the just determination of the controversy on its merits." H. R. Rep. No. 2743, 75th Cong., 3d Sess. 3.

Syllabus.

SUPERIOR FILMS, INC. *v.* DEPARTMENT OF EDUCATION OF OHIO, DIVISION OF FILM CENSORSHIP, HISSONG, SUPERINTENDENT.

NO. 217. APPEAL FROM THE SUPREME COURT OF OHIO.*

Argued January 6, 1954.—Decided January 18, 1954.

The judgments in these cases are reversed on the authority of *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495. P. 588.

159 Ohio St. 315, 112 N. E. 2d 311, reversed.

305 N. Y. 336, 113 N. E. 2d 502, reversed.

John C. Harlor argued the cause for appellant in No. 217. With him on the brief were *F. J. Wright* and *Michael Gesas*. *Earl F. Morris* was also of counsel.

Florence Perlow Shientag argued the cause for appellant in No. 274. With her on the brief was *Philip J. O'Brien, Jr.*

C. William O'Neill, Attorney General of Ohio, argued the cause for appellee in No. 217. With him on the brief were *Robert E. Leach*, Chief Counsel, and *Gwynne B. Myers*, Assistant Attorney General.

Charles A. Brind, Jr. argued the cause for appellees in No. 274. With him on the brief were *Nathaniel L. Goldstein*, Attorney General of New York, *Wendell P. Brown*, Solicitor General, and *Ruth Kessler Toch*, Assistant Attorney General.

Briefs of *amici curiae* supporting appellant in No. 217 were filed by *Sidney A. Schreiber* and *Philip J. O'Brien, Jr.* for the Motion Picture Association of America, Inc.

*Together with No. 274, *Commercial Pictures Corp.* v. *Regents of the University of the State of New York*, on appeal from the Court of Appeals of New York, argued January 7, 1954.

et al.; and by *Morris L. Ernst* for the National Council on Freedom from Censorship, a Committee of the American Civil Liberties Union.

PER CURIAM.

The judgments are reversed. *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK agrees, concurring.

The argument of Ohio and New York that the government may establish censorship over moving pictures is one I cannot accept. In 1925 Minnesota passed a law aimed at suppressing before publication any "malicious, scandalous and defamatory newspaper." The Court, speaking through Chief Justice Hughes, struck down that law as violating the Fourteenth Amendment, which has made the First Amendment applicable to the States. *Near* v. *Minnesota*, 283 U. S. 697. The "chief purpose" of the constitutional guaranty of liberty of the press, said the Court, was "to prevent previous restraints upon publication." *Id.*, p. 713.

The history of censorship is so well known it need not be summarized here. Certainly a system, still in force in some nations, which required a newspaper to submit to a board its news items, editorials, and cartoons before it published them could not be sustained. Nor could book publishers be required to submit their novels, poems, and tracts to censors for clearance before publication. Any such scheme of censorship would be in irreconcilable conflict with the language and purpose of the First Amendment.

Nor is it conceivable to me that producers of plays for the legitimate theatre or for television could be required to submit their manuscripts to censors on pain of penalty for producing them without approval. Certainly the

spoken word is as freely protected against prior restraints as that which is written. Such indeed is the force of our decision in *Thomas* v. *Collins*, 323 U. S. 516, 540. The freedom of the platform which it espouses carries with it freedom of the stage.

The same result in the case of motion pictures necessarily follows as a consequence of our holding in *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 502, that motion pictures are "within the free speech and free press guaranty of the First and Fourteenth Amendments."

Motion pictures are of course a different medium of expression than the public speech, the radio, the stage, the novel, or the magazine. But the First Amendment draws no distinction between the various methods of communicating ideas. On occasion one may be more powerful or effective than another. The movie, like the public speech, radio, or television, is transitory—here now and gone in an instant. The novel, the short story, the poem in printed form are permanently at hand to reenact the drama or to retell the story over and again. Which medium will give the most excitement and have the most enduring effect will vary with the theme and the actors. It is not for the censor to determine in any case. The First and the Fourteenth Amendments say that Congress and the States shall make "no law" which abridges freedom of speech or of the press. In order to sanction a system of censorship I would have to say that "no law" does not mean what it says, that "no law" is qualified to mean "some" laws. I cannot take that step.

In this Nation every writer, actor, or producer, no matter what medium of expression he may use, should be freed from the censor.

REPORTER'S NOTE.

The next page is purposely numbered 801. The numbers between 589 and 801 were purposely omitted, in order to make it possible to publish the *per curiam* decisions and orders in the current advance sheets or "preliminary prints" of the United States Reports with *permanent* page numbers, thus making the official citations available immediately.

DECISIONS PER CURIAM AND ORDERS FROM BEGINNING OF OCTOBER TERM, 1953, THROUGH JANUARY 18, 1954.*

CASE DISMISSED IN VACATION.

No. 147. SAWYER *v.* WISCONSIN. On petition for writ of certiorari to the Supreme Court of Wisconsin. August 28, 1953. Dismissed per stipulation pursuant to Rule 35 of the Rules of this Court. *Alfons B. Landa, Arthur D. Condon, Warren E. Magee* and *Delmar W. Holloman* for petitioner. *William J. McCauley* for respondent. Reported below: 263 Wis. 218, 56 N. W. 2d 811.

OCTOBER 5, 1953.

Miscellaneous Order.

No. 121. WALDER *v.* UNITED STATES. Certiorari, 345 U. S. 992, to the United States Court of Appeals for the Eighth Circuit. It is ordered that *Paul A. Porter*, of Washington, D. C., a member of the Bar of this Court, be appointed to serve as counsel for the petitioner in this case.

OCTOBER 12, 1953.

MR. CHIEF JUSTICE WARREN made the following statement:

"THE CHIEF JUSTICE having taken office on the day the matters to be reported on today were considered by the Court in conference, and having no familiarity with the records, did not participate in consideration of them.

"MR. JUSTICE BLACK will speak for the Court."

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*For decisions *per curiam* and orders announced on June 8 and 15, 1953, see 345 U. S. 971 *et seq.*

Per Curiam Decisions.

No. 49. UNITED STATES *v.* CARROLL CONSTRUCTION CO. ET AL. On petition for writ of certiorari to the Supreme Court of Washington. *Per Curiam:* The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded for consideration in the light of *United States* v. *Gilbert Associates*, 345 U. S. 361. MR. JUSTICE REED and MR. JUSTICE JACKSON dissent. They are of the opinion that *United States* v. *Gilbert Associates* is not pertinent. *Acting Solicitor General Stern* for the United States. Reported below: 41 Wash. 2d 317, 249 P. 2d 234.

No. 71. ARENDER ET AL. *v.* KINGWOOD OIL CO. ET AL. Appeal from the Supreme Court of Louisiana. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *Clyde R. Brown* for appellants. *Geo. Gunby* for appellees. Reported below: 222 La. 383, 62 So. 2d 615.

No. 151. SIMPSON ET AL. *v.* CITY OF LOS ANGELES ET AL. Appeal from the Supreme Court of California. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *Morris Lavine* for appellants. *Roger Arnebergh, William H. Neal, Bourke Jones* and *Alan G. Campbell* for appellees. Reported below: 40 Cal. 2d 271, 253 P. 2d 464.

No. 123. KALMANE *v.* GREEN, EXECUTOR. Appeal from the Court of Appeals of New York. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *Martin Popper* for appellant. Reported below: 305 N. Y. 148, 691, 111 N. E. 2d 424, 112 N. E. 2d 774.

No. 238. MCGEE *v.* NORTH CAROLINA. Appeal from the Supreme Court of North Carolina. *Per Curiam:* The

appeal is dismissed for want of a substantial federal question. *Maurice A. Weinstein* and *Richard M. Welling* for appellant. Reported below: 237 N. C. 633, 75 S. E. 2d 783.

No. 131. COLLINS *v.* CALIFORNIA. Appeal from the District Court of Appeal of California, Second Appellate District. *Per Curiam:* The appeal is dismissed for want of jurisdiction. 28 U. S. C. § 1257 (2). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari as required by 28 U. S. C. § 2103, certiorari is denied. Reported below: 117 Cal. App. 2d 175, 255 P. 2d 59.

No. 144. POND CREEK POCAHONTAS CO. ET AL. *v.* ALEXANDER, CHIEF OF THE DEPARTMENT OF MINES OF WEST VIRGINIA, ET AL. Appeal from the Supreme Court of Appeals of West Virginia. *Per Curiam:* Bierer, present Chief of the Department of Mines of West Virginia, substituted as a party appellee for Alexander. The appeal is dismissed for the want of a substantial federal question. *Don Rose* for appellants. Reported below: 137 W. Va. 864, 74 S. E. 2d 590.

No. 183. HOUSTON FIRE & CASUALTY INSURANCE CO. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Northern District of Texas. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. MR. JUSTICE BLACK is of the opinion that probable jurisdiction should be noted and the case set down for oral argument. *Reagan Sayers* for appellant. *Acting Solicitor General Stern* and *E. M. Reidy* for the United States and the Interstate Commerce Commission, appellees. Reported below: 115 F. Supp. 579.

No. 256. DENNY ET AL. *v.* WATSON, REAL ESTATE COMMISSIONER OF CALIFORNIA, ET AL. Appeal from the

District Court of Appeal of California, Second Appellate District. *Per Curiam:* The appeal is dismissed. *Morris Lavine* for appellants. *Edmund G. Brown,* Attorney General of California, *Howard Seymour Goldin* and *Lee B. Stanton,* Deputy Attorneys General, for appellees. Reported below: 114 Cal. App. 2d 491, 250 P. 2d 692.

No. 268. BROWN *v.* ILLINOIS. Appeal from the Supreme Court of Illinois. *Per Curiam:* The appeal is dismissed for the want of a substantial federal question. Reported below: 415 Ill. 23, 112 N. E. 2d 122.

Miscellaneous Orders.

No. —, Original. ARKANSAS *v.* TEXAS ET AL. This case is set for hearing on the motion for leave to file the complaint and return to rule to show cause, 345 U. S. 954, each side to be allowed thirty minutes for oral argument. *Tom Gentry,* Attorney General of Arkansas, for complainant. *John Ben Shepperd,* Attorney General of Texas, and *William H. Holloway* and *Marietta McGregor Creel,* Assistant Attorneys General, for defendants.

No. 39. WILKO *v.* SWAN ET AL., DOING BUSINESS AS HAYDEN, STONE & CO., ET AL. Certiorari, 345 U. S. 969, to the United States Court of Appeals for the Second Circuit. The motion of the Solicitor General, on behalf of the Securities and Exchange Commission, for leave to appear and present oral argument, as *amicus curiae,* is granted.

No. 195. INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, LOCAL 37, ET AL. *v.* BOYD, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. Appeal from the United States District Court for the Western District of Washington. Further consideration of the question of the jurisdiction of this Court in this case

is postponed to the hearing of the case on the merits. The appellants are requested to discuss on brief and oral argument the right of the union to sue for an injunction upon behalf of its members. *Norman Leonard* for appellants. Reported below: 111 F. Supp. 802.

No. 198. MICHIGAN-WISCONSIN PIPE LINE CO. *v.* CALVERT, COMPTROLLER OF PUBLIC ACCOUNTS, ET AL.; and

No. 200. PANHANDLE EASTERN PIPE LINE CO. *v.* CALVERT, COMPTROLLER OF PUBLIC ACCOUNTS, ET AL. Appeals from the Court of Civil Appeals of Texas, Third Supreme Judicial District. Further consideration of the motions to dismiss or affirm and of the jurisdiction of this Court in these cases is postponed to the hearing of the cases on the merits. *D. H. Culton*, *Everett L. Looney* and *R. Dean Moorhead* for appellants. With them were *S. A. L. Morgan* in No. 198, and *Edward H. Lange* and *Gene Woodfin* in No. 200. *John Ben Shepperd*, Attorney General of Texas, and *W. V. Geppert* and *C. K. Richards*, Assistant Attorneys General, for appellees. Reported below: 255 S. W. 2d 535.

No. 199. MICHIGAN-WISCONSIN PIPE LINE CO. *v.* CALVERT, COMPTROLLER OF PUBLIC ACCOUNTS, ET AL.; and

No. 201. PANHANDLE EASTERN PIPE LINE CO. *v.* CALVERT, COMPTROLLER OF PUBLIC ACCOUNTS, ET AL. Appeals from the Supreme Court of Texas. Further consideration of the motions to dismiss or affirm and of the jurisdiction of this Court in these cases is postponed to the hearing of the cases on the merits. *D. H. Culton*, *Everett L. Looney* and *R. Dean Moorhead* for appellants. With them were *S. A. L. Morgan* in No. 199, and *Edward H. Lange* and *Gene Woodfin* in No. 201. *John Ben Shepperd*, Attorney General of Texas, and *W. V. Geppert* and *C. K. Richards*, Assistant Attorneys General, for appellees.

No. 515, Misc., October Term, 1952. BARNETT *v.* DOERFLER, SHERIFF. Motion to vacate the order denying certiorari, 345 U. S. 1000, denied.

No. 62, Misc. BAKER *v.* ELLIS, GENERAL MANAGER, TEXAS PRISON SYSTEM. Court of Criminal Appeals of Texas. Certiorari denied. Motion for leave to file petition for writ of habeas corpus also denied.

No. 11, Misc. HOPWOOD *v.* STEELE, WARDEN;

No. 17, Misc. GRAYSON *v.* WARDEN, FEDERAL CORRECTIONAL INSTITUTION;

No. 19, Misc. SPENCER *v.* DICKEY ET AL.;

No. 41, Misc. TAYLOR *v.* SWOPE, WARDEN;

No. 46, Misc. DAVIDSON *v.* KILPATRICK, DIRECTOR, HUDSON RIVER STATE HOSPITAL;

No. 52, Misc. DAVIS *v.* ELLIS, GENERAL MANAGER, TEXAS PRISON SYSTEM;

No. 54, Misc. NELSON *v.* LOONEY, WARDEN;

No. 57, Misc. BURKHOLDER *v.* UNITED STATES; and

No. 74, Misc. ELLIOTT *v.* MICHIGAN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 132, Misc. TAYLOR *v.* SWOPE, WARDEN. Petition for writ of mandamus dismissed on motion of petitioner.

No. 45, Misc. EX PARTE COOPER;

No. 56, Misc. TAYLOR *v.* BROWNELL, UNITED STATES ATTORNEY GENERAL; and

No. 81, Misc. TAYLOR *v.* UNITED STATES COURT OF CLAIMS. Motions for leave to file petitions for writs of mandamus denied.

No. 13, Misc. AMERICAN AIRLINES, INC. ET AL. *v.* SLICK AIRWAYS, INC. Motion for leave to file petition for writ of certiorari to the United States District Court for

the District of New Jersey denied. *Samuel E. Gates* and *John W. Griggs* for American Airlines, Inc., *Josiah Stryker* for United Air Lines, Inc., *Gerald B. Brophy, Horace G. Hitchcock* and *George Gildea* for Transcontinental & Western Air, Inc., and *Waldron M. Ward* for Air Cargo, Inc., petitioners. *Stephen Ailes, William E. Miller, Paul A. Porter* and *Walton Hamilton* for respondent. Reported below: See 107 F. Supp. 199.

No. 86, Misc. HENDRICKSON *v.* BALDI, SUPERINTENDENT, PHILADELPHIA COUNTY PRISON, PENNSYLVANIA. Motion for leave to file petition for writ of certiorari denied.

No. 44, Misc. SETTLER *v.* MICHIGAN STATE PAROLE BOARD ET AL. Motion for leave to file petition for writ of prohibition and other relief denied.

No. 49, Misc. VETTERLI *v.* UNITED STATES. Petition for allowance of an appeal denied.

Probable Jurisdiction Noted. (See also Nos. 195, 198, 199, 200 and 201, supra.)

No. 69. BARSKY *v.* BOARD OF REGENTS OF THE UNIVERSITY OF NEW YORK. Appeal from the Court of Appeals of New York. Probable jurisdiction noted. The motion for leave to file brief of Haven Emerson and others, as *amici curiae*, is denied. *Abraham Fishbein* for appellant. *Nathaniel L. Goldstein*, Attorney General of New York, *Wendell P. Brown*, Solicitor General, and *Henry S. Manley*, Assistant Attorney General, for appellee. Reported below: 305 N. Y. 89, 691, 111 N. E. 2d 222, 112 N. E. 2d 773.

No. 115. KERN-LIMERICK, INC. ET AL. *v.* PARKER, COMMISSIONER OF REVENUES FOR ARKANSAS. Appeal from the Supreme Court of Arkansas. Probable juris-

diction noted. *A. F. House* for Kern-Limerick, Inc., and *Acting Solicitor General Stern* for the United States, appellants. Reported below: 221 Ark. 439, 254 S. W. 2d 454.

No. 163. Railway Express Agency, Inc. *v.* Virginia. Appeal from the Supreme Court of Appeals of Virginia. Probable jurisdiction noted. *J. H. Mooers, Thomas B. Gay* and *William H. Waldrop, Jr.* for appellant. *J. Lindsay Almond, Jr.*, Attorney General of Virginia, *Frederick T. Gray*, Assistant Attorney General, and *Henry T. Wickham* for appellee. Reported below: 194 Va. 757, 75 S. E. 2d 61.

No. 117. Federal Communications Commission *v.* American Broadcasting Co., Inc.;

No. 118. Federal Communications Commission *v.* National Broadcasting Co., Inc.; and

No. 119. Federal Communications Commission *v.* Columbia Broadcasting System, Inc. Appeals from the United States District Court for the Southern District of New York. Probable jurisdiction noted. *Benedict P. Cottone, Richard A. Solomon, J. Roger Wollenberg* and *Daniel R. Ohlbaum* for appellant. *Alfred McCormack* and *George B. Turner* for appellee in No. 117; *Paul W. Williams* for appellee in No. 118; and *Max Freund* and *Stanley M. Silverberg* for appellee in No. 119. Reported below: 110 F. Supp. 374.

No. 128. County Board of Arlington County et al. *v.* State Milk Commission. Appeal from the Supreme Court of Appeals of Virginia. Probable jurisdiction noted. *Malcolm D. Miller* for appellants. *J. Lindsay Almond, Jr.*, Attorney General of Virginia, *Thomas M. Miller*, Assistant Attorney General, and *Roger J. Whiteford*, Special Assistant to the Attorney General, for appellee.

No. 160. MILLER BROTHERS CO. *v.* MARYLAND. Appeal from the Court of Appeals of Maryland. Probable jurisdiction noted. *James Piper, William L. Marbury, William Poole* and *James L. Latchum* for appellant. *Edward D. E. Rollins*, Attorney General of Maryland, *J. Edgar Harvey*, Deputy Attorney General, and *Francis D. Murnaghan, Jr.*, Assistant Attorney General, for appellee. Reported below: 201 Md. 535, 95 A. 2d 286.

No. 217. SUPERIOR FILMS, INC. *v.* DEPARTMENT OF EDUCATION OF OHIO, DIVISION OF FILM CENSORSHIP, HISSONG, SUPERINTENDENT. Appeal from the Supreme Court of Ohio. Probable jurisdiction noted. *Francis J. Wright, Michael Gesas, Earl F. Morris* and *John C. Harlor* for appellant. *C. William O'Neill*, Attorney General of Ohio, *Robert E. Leach*, Chief Counsel, and *Gwynne B. Myers*, Assistant Attorney General, for appellee. Reported below: 159 Ohio St. 315, 112 N. E. 2d 311.

Certiorari Granted. (*See also No. 109, ante, p. 325, No. 114, ante, p. 327, and No. 49, ante, p. 802.*)

No. 65. UNITED STATES *v.* BINGHAMTON CONSTRUCTION CO., INC. Court of Claims. Certiorari granted. *Acting Solicitor General Stern* for the United States. *Malcolm A. MacIntyre* for respondent. Reported below: 123 Ct. Cl. 804, 107 F. Supp. 712.

No. 92. UNITED STATES *v.* CITY OF NEW BRITAIN ET AL. Supreme Court of Errors of Connecticut. Certiorari granted. *Acting Solicitor General Stern* for the United States. *William S. Gordon, Jr.* for the City of New Britain, respondent. Reported below: 139 Conn. 363, 94 A. 2d 10.

No. 67. EMSPAK *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit.

Certiorari granted, except as to question No. 4 presented by the petition for the writ. *David Scribner, Frank J. Donner, Arthur Kinoy* and *Allan R. Rosenberg* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Olney, Beatrice Rosenberg, Carl H. Imlay* and *John R. Wilkins* for the United States. Reported below: 91 U. S. App. D. C. 378, 203 F. 2d 54.

No. 94. UNITED STATES *v.* LINDSAY ET AL. C. A. 1st Cir. Certiorari granted. *Acting Solicitor General Stern* for the United States. *Edward C. Park* for respondents. Reported below: 202 F. 2d 239.

No. 174. WHITE *v.* BALTIMORE & OHIO RAILROAD CO. C. A. 6th Cir. Certiorari granted. *Paul M. Herbert* for petitioner. *E. H. Burgess* and *Kenneth H. Ekin* for respondent. Reported below: 203 F. 2d 567.

No. 209. CHICAGO, ROCK ISLAND & PACIFIC RAILROAD CO. *v.* STUDE ET AL. C. A. 8th Cir. Certiorari granted. *Ralph L. Read* and *Alden B. Howland* for petitioner. *Raymond A. Smith* for respondents. Reported below: 204 F. 2d 954.

No. 184. GENERAL PROTECTIVE COMMITTEE FOR THE HOLDERS OF OPTION WARRANTS OF THE UNITED CORPORATION *v.* SECURITIES AND EXCHANGE COMMISSION ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted limited to the question as to the jurisdiction of a court of appeals or a district court to review orders of the Securities and Exchange Commission. *M. Quinn Shaughnessy, Thomas Reath* and *Henry S. Drinker* for petitioner. *Acting Solicitor General Stern, Roger S. Foster* and *Aaron Levy* for the Securities and Exchange Commission; and *Richard Joyce Smith* for the United Corporation, respondents. Reported below: 92 U. S. App. D. C. 172, 203 F. 2d 611.

No. 222. CIVIL AERONAUTICS BOARD *v.* SUMMERFIELD, POSTMASTER GENERAL, ET AL.;

No. 223. DELTA AIR LINES, INC. *v.* SUMMERFIELD, POSTMASTER GENERAL, ET AL.;

No. 224. CIVIL AERONAUTICS BOARD *v.* SUMMERFIELD, POSTMASTER GENERAL, ET AL.; and

No. 225. WESTERN AIR LINES, INC. *v.* CIVIL AERONAUTICS BOARD ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Emory T. Nunneley, Jr.* and *O. D. Ozment* for the Civil Aeronautics Board. *L. Welch Pogue* for Delta Air Lines, Inc. *Hugh W. Darling* and *D. P. Renda* for Western Air Lines, Inc. *Acting Solicitor General Stern* filed memorandums stating that the United States and the Postmaster General do not oppose the petitions. *Hubert A. Schneider* for Braniff Airlines, Inc., *C. Edward Leasure* for Northwest Airlines, Inc., and *Gerald B. Brophy* for Trans World Airlines, Inc. filed a brief, as *amici curiae*, supporting the petition in No. 222. Reported below: 92 U. S. App. D. C. 248, 256, 207 F. 2d 200, 207.

No. 228. MAZER ET AL., DOING BUSINESS AS JUNE LAMP MANUFACTURING CO., *v.* STEIN ET AL., DOING BUSINESS AS REGLOR OF CALIFORNIA. C. A. 4th Cir. Certiorari granted. The Solicitor General is invited to file a brief setting forth, along with other matters he deems pertinent, the views of the Copyright Office and a statement of its relevant practice. *Max R. Kraus* and *Robert L. Kahn* for petitioners. Reported below: 204 F. 2d 472.

No. 2, Misc. HERNANDEZ *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari granted. Petitioner *pro se*. *John Ben Shepperd*, Attorney General of Texas, and *Rudy G. Rice*, *Milton Richardson* and *Horace Wimberly*, Assistant Attorneys General, for respondent. Reported below: 159 Tex. Cr. R. —, 251 S. W. 2d 531.

No. 6, Misc. GALVAN *v.* PRESS, OFFICER IN CHARGE, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari granted. *Harry Wolpin* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Olney, Beatrice Rosenberg* and *Murry Lee Randall* for respondent. Reported below: 201 F. 2d 302.

Certiorari Denied. (See also No. 131, ante, p. 803, and Misc. Nos. 13, 62 and 86, ante, pp. 806, 807.)

No. 26. IN RE WRIGHT. Supreme Court of Nevada. Certiorari denied. *Warren E. Miller* for petitioner. *Toy R. Gregory* for the State Bar of Nevada, respondent. Reported below: 69 Nev. 259, 248 P. 2d 1080.

No. 42. GRAVES, INCORPORATED *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. *William Saunders Henley* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Holland, Ellis N. Slack, S. Dee Hanson* and *John R. Benney* for respondent. Reported below: 202 F. 2d 286.

No. 45. NEW PITTSBURGH COAL CO. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Chalmers M. Parker* for petitioner. *Acting Solicitor General Davis, Assistant Attorney General Holland, Ellis N. Slack* and *Fred E. Youngman* for the United States. Reported below: 200 F. 2d 146.

No. 46. MCCORMICK *v.* LEWIS ET AL. C. A. 5th Cir. Certiorari denied. *John M. Coe* for petitioner. *E. Dixie Beggs* for respondents. Reported below: 201 F. 2d 861.

No. 58. PENNSYLVANIA MUTUAL LIFE INSURANCE CO. *v.* HARDING. Supreme Court of Pennsylvania, Eastern District. Certiorari denied. *M. Stuart Goldin* for petitioner. Reported below: 373 Pa. 270, 95 A. 2d 221.

No. 59. ETERPEN FINANCIERA SOCIEDAD DE RESPONSABILIDAD LIMITADA (FORMERLY ETERPEN, S. A.) *v.* UNITED STATES. Court of Claims. Certiorari denied. *William A. Patty* for petitioner. *Acting Solicitor General Davis, Assistant Attorney General Holland, Ellis N. Slack* and *Melva M. Graney* for the United States. Reported below: 124 Ct. Cl. 20, 108 F. Supp. 100.

No. 60. TINSLEY *v.* KENTUCKY. Court of Appeals of Kentucky. Certiorari denied. *Chat Chancellor* for petitioner. *J. D. Buckman, Jr.*, Attorney General of Kentucky, and *Zeb A. Stewart*, Assistant Attorney General, for respondent. Reported below: 26 S. W. 2d 11.

No. 62. OWENS ET AL. *v.* WILLIAM H. BANKS WAREHOUSES, INC. C. A. 5th Cir. Certiorari denied. *W. Dewey Lawrence* for petitioners. *Thomas B. Ramey* and *L. Duncan Lloyd* for respondent. Reported below: 202 F. 2d 689.

No. 63. LAUGHLIN *v.* LOFTIN ET AL., TRUSTEES. Supreme Court of Florida. Certiorari denied. *William C. Gaither* for petitioner. *Russell L. Frink* and *Robert H. Anderson* for respondents. Reported below: 62 So. 2d 745.

No. 64. FEHSENFELD ET AL. *v.* WHIPPLE ET AL. Supreme Court of Kansas. Certiorari denied. *Preston Pope Reynolds* for petitioners. Reported below: 173 Kan. 427, 249 P. 2d 638.

No. 68. BIGGS *v.* CITY OF CHICAGO ET AL. Supreme Court of Illinois. Certiorari denied. Petitioner *pro se*. *John J. Mortimer, L. Louis Karton* and *Arthur Magid* for respondents. Reported below: See 411 Ill. 566, 104 N. E. 2d 611.

No. 70. COLONIAL FABRICS, INC. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Mark M. Horblit* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Holland, Ellis N. Slack* and *I. Henry Kutz* for respondent. Reported below: 202 F. 2d 105.

No. 72. SWINERTON ET AL., DOING BUSINESS AS SWINERTON & WALBERG CO., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. *Gardiner Johnson* for petitioners. *Acting Solicitor General Stern, George J. Bott, David P. Findling, Dominick L. Manoli* and *Elizabeth Weston* for respondent. Briefs of *amici curiae* supporting petitioners were filed by *William E. Leahy, William J. Hughes, Jr.* and *Cornelius R. Gray* for the Building & Construction Trades Department of the American Federation of Labor; and by *Lewis T. Gardiner* for the National Constructors Association. Reported below: 202 F. 2d 511.

No. 74. FEITLER ET AL., TRADING AS GARDNER & CO., *v.* FEDERAL TRADE COMMISSION. C. A. 9th Cir. Certiorari denied. *George E. Lindelof, Jr.* for petitioners. *Acting Solicitor General Stern, Assistant Attorney General Barnes, Daniel M. Friedman, William T. Kelley* and *Robert B. Dawkins* for respondent. Reported below: 201 F. 2d 790.

No. 75. AMERICAN HARDWARE & EQUIPMENT CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. *Joseph J. O'Connell, Jr.* for petitioner. *Acting Solicitor General Davis, Assistant Attorney General Holland, Ellis N. Slack* and *Harry Marselli* for respondent. Reported below: 202 F. 2d 126.

No. 76. DORTCH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Rodes K. Myers* for petitioner. *Act-*

ing Solicitor General Davis, Assistant Attorney General Olney, Beatrice Rosenberg and *Robert G. Maysack* for the United States. Reported below: 203 F. 2d 709.

No. 77. COOKE *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 10th Cir. Certiorari denied. *John H. Cantrell* and *Edward M. Box* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Holland, Ellis N. Slack, Carlton Fox* and *John R. Benney* for respondent. Reported below: 203 F. 2d 258.

No. 79. COLORADO RIVER MUNICIPAL WATER DISTRICT ET AL. *v.* BOARD OF WATER ENGINEERS OF TEXAS ET AL. Supreme Court of Texas. Certiorari denied. *Victor W. Bouldin* for petitioners. *John Ben Shepperd*, Attorney General of Texas, *Burnell Waldrep*, Executive Assistant Attorney General, *Thomas Black*, Assistant Attorney General, and *Joe R. Greenhill*, Special Assistant Attorney General, for respondents. Reported below: 152 Tex. —, 254 S. W. 2d 369.

No. 80. CAGLE *v.* McQUEEN ET AL., DOING BUSINESS AS McQUEEN & STOUT, ET AL. C. A. 5th Cir. Certiorari denied. *Warren E. Miller* for petitioner. *Emil C. Rassman* for respondents. Reported below: 200 F. 2d 186.

No. 82. PORTNER *v.* CENTRAL-PENN NATIONAL BANK. C. A. 3d Cir. Certiorari denied. *Harry Norman Ball* for petitioner. *Ira Jewell Williams, Thomas Raeburn White, Joseph W. Henderson* and *Ira Jewell Williams, Jr.* for respondent. Reported below: 201 F. 2d 607.

No. 83. PALACE CORPORATION *v.* UNITED STATES. Court of Claims. Certiorari denied. *Leo Fixler* for petitioner. *Acting Solicitor General Davis, Assistant*

Attorney General Burger and *Samuel D. Slade* for the United States. Reported below: 124 Ct. Cl. 545, 110 F. Supp. 476.

No. 86. TOPPS CHEWING GUM, INC. *v.* HAELAN LABORATORIES, INC. C. A. 2d Cir. Certiorari denied. *George E. Middleton* for petitioner. *Jonas J. Shapiro* for respondent. Reported below: 202 F. 2d 866.

No. 89. GILL *v.* PENNSYLVANIA RAILROAD CO. C. A. 3d Cir. Certiorari denied. *Joseph G. Feldman* for petitioner. *Philip Price, Hugh B. Cox* and *Theodore Voorhees* for respondent. Reported below: 201 F. 2d 718.

No. 90. KUSHELEWITZ ET AL., DOING BUSINESS AS ELKAY TEXTILE CO., *v.* NATIONAL CITY BANK OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. *Jacob E. Heller* for petitioners. Reported below: 202 F. 2d 588.

No. 91. SMITH *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Robert J. Lansdowne* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Holland, Ellis N. Slack, Helen Goodner* and *Walter Akerman, Jr.* for respondent. Reported below: 203 F. 2d 310.

No. 95. HELTON *v.* TENNESSEE. Supreme Court of Tennessee. Certiorari denied. *John J. Hooker* for petitioner. *Roy H. Beeler*, Attorney General of Tennessee, and *Nat Tipton* for respondent. Reported below: 195 Tenn. 36, 255 S. W. 2d 694.

No. 96. THOMPSON, TRUSTEE, *v.* AMERICAN ABRASIVE METALS CO. Court of Civil Appeals of Texas, First Supreme Judicial District. Certiorari denied. *Walter F. Woodul* for petitioner. *John Leroy Jeffers* for respondent. Reported below: 253 S. W. 2d 83.

No. 97. TUCKER *v.* NATIONAL LINEN SERVICE CORP. ET AL. C. A. 5th Cir. Certiorari denied. *William G. McRae* for petitioner. *B. D. Murphy, James N. Frazer* and *Max F. Goldstein* for the National Linen Service Corporation et al.; and *James A. Branch* for Souers et al., respondents. Reported below: 200 F. 2d 858.

No. 98. KOHN, DOING BUSINESS AS EDWARD KOHN CO., *v.* FREEHILL, DIRECTOR OF PRICE STABILIZATION. United States Emergency Court of Appeals. Certiorari denied. *Edward D. Feinberg, Raymond K. Fried* and *Isadore Fried* for petitioner. *Acting Solicitor General Davis, Assistant Attorney General Burger* and *Samuel D. Slade* for respondent. Reported below: 203 F. 2d 958.

No. 101. MISSISSIPPI RIVER SAND & GRAVEL CO. *v.* WILKES, ADMINISTRATOR, ET AL. C. A. 6th Cir. Certiorari denied. *L. E. Gwinn* and *James M. Reeves* for petitioner. *Fred L. Henley* for respondents. Reported below: 202 F. 2d 383.

No. 102. MUTUAL LIFE INSURANCE CO. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Joseph V. Lane, Jr.* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Holland, Ellis N. Slack, Robert N. Anderson* and *H. S. Fessenden* for the United States. Reported below: 124 Ct. Cl. 626, 110 F. Supp. 606.

No. 103. TENDLER *v.* JAFFE ET AL., TRADING AS NEW YORK DECORATING CO. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *John P. Burke* for petitioner. Reported below: 92 U. S. App. D. C. 2, 203 F. 2d 14.

No. 106. ILLINOIS EX REL. KENNEDY *v.* HURLEY ET AL., CIVIL SERVICE COMMISSIONERS OF THE CITY OF CHICAGO. Appellate Court of Illinois, First District. Certiorari de-

nied. *Daniel D. Glasser* and *Eugene R. Ward* for petitioner. *John J. Mortimer, L. Louis Karton* and *Arthur Magid* for respondents. Reported below: 348 Ill. App. 265, 108 N. E. 2d 808.

No. 107. UNITED STATES COLD STORAGE CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. *H. Bascom Thomas, Jr.* for petitioner. *Acting Solicitor General Davis, George J. Bott, David P. Findling* and *Dominick L. Manoli* for respondent. Reported below: 203 F. 2d 924.

No. 108. ADWOOD CORPORATION *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. *Richard Bentley* for petitioner. *Acting Solicitor General Davis, Assistant Attorney General Holland, Ellis N. Slack* and *Melva M. Graney* for respondent. Reported below: 200 F. 2d 552.

No. 110. FOSTER ET AL., DOING BUSINESS AS J. M. FOSTER & CO., *v.* BUCKNER. C. A. 6th Cir. Certiorari denied. *William J. Eggenberger* for petitioners. *James A. Markle* for respondent. Reported below: 203 F. 2d 527.

No. 111. SECURITIES AND EXCHANGE COMMISSION *v.* MASTERSON. C. A. 3d Cir. Certiorari denied. *Acting Solicitor General Stern* and *Roger S. Foster* for petitioner. *E. Ennalls Berl* for respondent. Reported below: 202 F. 2d 638.

No. 112. ROCKWELL MANUFACTURING CO. *v.* THE STANLEY WORKS. C. A. 3d Cir. Certiorari denied. *William A. Strauch* and *J. Matthews Neale* for petitioner. *T. Clay Lindsey* for respondent. Reported below: 203 F. 2d 846.

No. 116. ATKINS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Hayden C. Covington* for petitioner.

Acting Solicitor General Davis, Assistant Attorney General Olney, Beatrice Rosenberg and *Edward S. Szukelewicz* for the United States. Reported below: 204 F. 2d 269.

No. 122. Weisbrod *v.* United States. C. A. 7th Cir. Certiorari denied. *Philip B. Kurland* for petitioner. *Acting Solicitor General Davis, Assistant Attorney General Burger* and *Samuel D. Slade* for the United States. Reported below: 202 F. 2d 629.

No. 124. Grenada Industries, Inc. *v.* Commissioner of Internal Revenue. C. A. 5th Cir. Certiorari denied. *Robert A. Littleton, Philip B. Perlman, Arthur L. Gilliom* and *Elbert R. Gilliom* for petitioner. *Acting Solicitor General Davis, Assistant Attorney General Holland, Ellis N. Slack* and *I. Henry Kutz* for respondent. Reported below: 202 F. 2d 873.

No. 126. National Labor Relations Board *v.* Marine Engineers Beneficial Association, No. 13. C. A. 3d Cir. Certiorari denied. *Acting Solicitor General Stern* and *George J. Bott* for petitioner. *Abraham E. Freedman, Clifford D. O'Brien* and *Ruth Weyand* for respondent. Reported below: 202 F. 2d 546.

No. 127. Chromium Products Corp. *v.* Reconstruction Finance Corp. C. A. 9th Cir. Certiorari denied. *Burton K. Wheeler, Robert G. Seaks* and *Horace S. Davis* for petitioner. *Acting Solicitor General Davis* for respondent. Reported below: 202 F. 2d 664.

No. 132. Hogan *v.* City of Miami Beach. Supreme Court of Florida. Certiorari denied. *Carl T. Hoffman* for petitioner. *Thos. H. Anderson* for respondent. Reported below: 63 So. 2d 493.

No. 135. GEHMAN *v.* SMITH, COLLECTOR OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. *Henry D. O'Connor* for petitioner. *Acting Solicitor General Davis, Assistant Attorney General Holland, Ellis N. Slack, A. F. Prescott* and *John J. Kelley, Jr.* for respondent. Reported below: 203 F. 2d 953.

No. 136. VAUGHAN NOVELTY MFG. CO. *v.* G. G. GREENE MFG. CORP. C. A. 3d Cir. Certiorari denied. *Warren C. Horton* for petitioner. *William Glassman* for respondent. Reported below: 202 F. 2d 172.

No. 137. ELSALTO REAL ESTATE, INC. *v.* CITY OF MIAMI BEACH. Supreme Court of Florida. Certiorari denied. *Carl T. Hoffman* for petitioner. *Thos. H. Anderson* for respondent. Reported below: 63 So. 2d 405.

No. 138. PENNSYLVANIA MUTUAL LIFE INSURANCE CO. *v.* BELEY. Supreme Court of Pennsylvania, Western District. Certiorari denied. *W. Denning Stewart* for petitioner. *Samuel J. Goldstein* for respondent. Reported below: 373 Pa. 231, 95 A. 2d 202.

No. 140. WALET *v.* JEFFERSON LAKE SULPHUR CO. C. A. 5th Cir. Certiorari denied. *James G. Schillin* for petitioner. *Eberhard P. Deutsch* for respondent. Reported below: 202 F. 2d 433.

No. 141. NEW WRINKLE, INC. ET AL. *v.* WATSON, COMMISSIONER OF PATENTS. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *H. A. Toulmin, Jr.* and *F. E. Drummond* for petitioners. *Acting Solicitor General Davis, Assistant Attorney General Burger* and *Samuel D. Slade* for respondent. Reported below: 92 U. S. App. D. C. 143, 204 F. 2d 35.

No. 142. MILLER *v.* JONES. C. A. 3d Cir. Certiorari denied. *Grover C. Ladner* for petitioner. *Carl E. Glock* for respondent. Reported below: 203 F. 2d 131.

No. 143. JAMAICA WATER SUPPLY CO. *v.* CITY OF NEW YORK. Court of Appeals of New York. Certiorari denied. *John J. Donohue* for petitioner. *Denis M. Hurley* and *Seymour B. Quel* for respondent. Reported below: 305 N. Y. 560, 111 N. E. 2d 437.

No. 145. SWITZER BROTHERS, INC. ET AL. *v.* TEXAS-MILLER HAT CORP. ET AL. C. A. 5th Cir. Certiorari denied. *Albert L. Ely, Jr.* for petitioners. *George B. Finnegan, Jr.* for respondents. Reported below: 201 F. 2d 824.

No. 146. FINNEGAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Morris A. Shenker* for petitioner. *Acting Solicitor General Davis, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 204 F. 2d 105.

No. 149. CARLSON & SULLIVAN, INC. *v.* BIGELOW & DOWSE CO. ET AL. C. A. 1st Cir. Certiorari denied. *Daniel L. Morris, Edward G. Curtis* and *Marshall M. Holcombe* for petitioner. *T. Clay Lindsey* for respondents. Reported below: 202 F. 2d 654.

No. 150. RUSSELL BOX CO. *v.* GRANT PAPER BOX CO. C. A. 1st Cir. Certiorari denied. *Herbert A. Baker* and *Richard G. Radue* for petitioner. *Hector M. Holmes* and *William H. Parmelee* for respondent. Reported below: 203 F. 2d 177.

No. 152. CARLOR CO., INC. *v.* CITY OF MIAMI. Supreme Court of Florida. Certiorari denied. *Charles A. Brind, Jr.* for petitioner. *Miller Walton* for respondent. Reported below: 62 So. 2d 897.

No. 153. WILLIAMS ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Coleman Gangel* and *Joseph E. Brill* for petitioners. *Acting Solicitor General Stern, Assistant Attorney General Olney, Beatrice Rosenberg* and *Carl H. Imlay* for the United States. Reported below: 203 F. 2d 572.

No. 155. ESTATE STOVE CO. ET AL. *v.* GENERAL MOTORS CORP. ET AL. C. A. 6th Cir. Certiorari denied. *Morris Kirschstein* for petitioners. *Harry W. Lindsey, Jr.* for respondents. Reported below: 203 F. 2d 912.

No. 157. BURGESS BATTERY CO. *v.* MARZALL (WATSON SUBSTITUTED), COMMISSIONER OF PATENTS. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *George I. Haight* and *Clarence M. Fisher* for petitioner. *Acting Solicitor General Davis, Assistant Attorney General Burger, Paul A. Sweeney* and *Herman Marcuse* for respondent. Reported below: 92 U. S. App. D. C. 398, 204 F. 2d 35.

No. 158. LOWDERMILK *v.* OHIO OIL CO. C. A. 7th Cir. Certiorari denied. *Garrett W. Olds* and *Asa J. Smith* for petitioner. *Hubert Hickam* and *Thomas M. Scanlon* for respondent. Reported below: 203 F. 2d 399.

No. 161. GAZAN *v.* CORBETT ET AL., CONSTITUTING THE ZONING BOARD OF APPEALS OF THE TOWN OF BROOKHAVEN. Court of Appeals of New York. Certiorari denied. *Simone N. Gazan* and *Charles A. Ellis* for petitioner. *Robert H. Pelletreau* for respondents. Reported below: 305 N. Y. 693, 112 N. E. 2d 775.

No. 162. ECK ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Milton Gould* for petitioners. *Acting Solicitor General Stern,*

Assistant Attorney General Holland, Ellis N. Slack, S. Dee Hanson and *Murray L. Schwartz* for respondent. Reported below: 202 F. 2d 750.

No. 165. PROPST ET AL. *v.* BOARD OF EDUCATIONAL LANDS AND FUNDS OF NEBRASKA ET AL. Supreme Court of Nebraska. Certiorari denied. *Wendell Berge* for petitioners. *Clarence S. Beck*, Attorney General of Nebraska, and *Robert A. Nelson*, Assistant Attorney General, for respondents. Reported below: 156 Neb. 226, 55 N. W. 2d 653.

No. 166. ONEIDA, LTD. *v.* GRAYSON-ROBINSON STORES, INC. Supreme Court of Georgia. Certiorari denied. *Wallace H. Martin, Walter J. Halliday, Robert B. Troutman* and *William K. Meadow* for petitioner. Reported below: 209 Ga. 613, 75 S. E. 2d 161.

No. 168. CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD CO. *v.* BOARD OF RAILROAD COMMISSIONERS OF MONTANA ET AL. Supreme Court of Montana. Certiorari denied. *H. C. Pauly* for petitioner. *Arnold H. Olsen*, Attorney General of Montana, *Vera Jean Heckathorn*, Assistant Attorney General, and *Edwin S. Booth* for the Board of Railroad Commissioners; and *Lester H. Loble* for the Railroad Brotherhoods of Railroad Trainmen, Engineers, Firemen and Conductors et al., respondents. Reported below: 126 Mont. 568, 255 P. 2d 346.

No. 170. MAXWELL *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. *Geo. E. H. Goodner* and *Dewey R. Roark, Jr.* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Holland* and *Ellis N. Slack* for respondent. Reported below: 203 F. 2d 567.

No. 171. MARYLAND EX REL. CHANNELL *v.* MURPHY. Court of Appeals of Maryland. Certiorari denied. *Harry O. Levin* and *Marshall A. Levin* for petitioner. *Edward D. E. Rollins*, Attorney General of Maryland, *J. Edgar Harvey*, Deputy Attorney General, and *Ambrose T. Hartman*, Assistant Attorney General, for respondent. Reported below: 202 Md. 650, 96 A. 2d 473.

No. 173. JOLIET CONTRACTORS ASSOCIATION ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 7th Cir. Certiorari denied. *Charles M. Price* and *Charles B. Mahin* for petitioners. *Acting Solicitor General Stern*, *David P. Findling*, *Dominick L. Manoli* and *Norton J. Come* for the National Labor Relations Board; and *Daniel D. Carmell* and *Lester Asher* for the Glaziers' Union, Local No. 27, Brotherhood of Painters, Decorators and Paper Hangers, respondents. Reported below: 202 F. 2d 606.

No. 178. DAVIS FROZEN FOODS, INC. *v.* NORFOLK SOUTHERN RAILWAY CO. C. A. 4th Cir. Certiorari denied. *Murray Allen* for petitioner. *Robert N. Simms* for respondent. Reported below: 204 F. 2d 839.

No. 179. COLEMAN, ATTORNEY GENERAL, *v.* TRUNKLINE GAS CO. Supreme Court of Mississippi. Certiorari denied. *J. P. Coleman*, Attorney General of Mississippi, *J. H. Sumrall* and *Dugas Shands* for petitioner. *Gene M. Woodfin* for respondent. Reported below: 218 Miss. 285, 63 So. 2d 73.

No. 185. O'LOUGHLIN *v.* O'LOUGHLIN. Supreme Court of New Jersey. Certiorari denied. *Lionel P. Kristeller*, *Saul J. Zucker* and *Alan Y. Cole* for petitioner. *Harry Cohn* for respondent. Reported below: 12 N. J. 222, 96 A. 2d 410.

No. 186. GILL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *George F. Callaghan* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Olney, Robert S. Erdahl* and *Robert G. Maysack* for the United States. Reported below: 204 F. 2d 740.

No. 187. VAN HOOK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Hubert Van Hook, pro se. Acting Solicitor General Stern, Assistant Attorney General Holland, Ellis N. Slack, Hilbert P. Zarky* and *Morton K. Rothschild* for the United States. Reported below: 204 F. 2d 25.

No. 192. WILLIAM H. BANKS WAREHOUSES, INC. ET AL. *v.* WATT ET AL. C. A. 9th Cir. Certiorari denied. *L. Duncan Lloyd* and *William R. Wallace, Jr.* for petitioners. *Clifford E. Fix* for respondents. Reported below: 205 F. 2d 44.

No. 193. MCCLELLAN, TRUSTEE IN BANKRUPTCY, ET AL. *v.* MONTANA-DAKOTA UTILITIES CO. C. A. 8th Cir. Certiorari denied. *George W. Tackabury* for petitioners. *John C. Benson* and *Rodger L. Nordbye* for respondent. Reported below: 204 F. 2d 166.

No. 194. HYDROCARBON PRODUCTION CO., INC. *v.* VALLEY ACRES WATER DISTRICT ET AL. C. A. 5th Cir. Certiorari denied. *Victor W. Bouldin* for petitioner. *John D. McCall* and *Harry L. Hall* for respondents. Reported below: 204 F. 2d 212.

No. 197. LIEBERMAN *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. *George R. Sommer* for petitioner. *Hyman Isaac* for respondent. Reported below: 13 N. J. 137, 98 A. 2d 295.

No. 202. WEIDLICH *v.* ESTATE OF WEIDLICH ET AL. Supreme Court of Errors of Connecticut. Certiorari denied. *Clifton F. Weidlich* for petitioner. *David Goldstein* for respondents. Reported below: 139 Conn. 652, 96 A. 2d 547.

No. 203. CITY OF KANSAS CITY, MISSOURI, ET AL. *v.* WILLIAMS ET AL. C. A. 8th Cir. Certiorari denied. *David M. Proctor* for petitioners. *Robert L. Carter* and *Thurgood Marshall* for respondents. Reported below: 205 F. 2d 47.

No. 204. SPRIGGS *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *H. Clifford Allder* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Olney, Robert S. Erdahl* and *Robert G. Maysack* for the United States. Reported below: 92 U. S. App. D. C. 399, 205 F. 2d 885.

No. 205. KENT, PRESIDENT OF FLIGHT ENGINEER OFFICERS' ASSOCIATION, *v.* CIVIL AERONAUTICS BOARD ET AL. C. A. 2d Cir. Certiorari denied. *Frank S. Ketcham* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Barnes, Ralph S. Spritzer, Emory T. Nunneley, Jr.* and *O. D. Ozment* for the Civil Aeronautics Board; and *Daniel Kornblum* for Former AOA Flight Engineers et al., respondents. Reported below: 204 F. 2d 263.

No. 206. REYNOLDS *v.* UNITED STATES. Court of Claims. Certiorari denied. *Frank F. Reynolds, pro se. Acting Solicitor General Stern, Assistant Attorney General Burger, Samuel D. Slade* and *Cornelius J. Peck* for the United States. Reported below: 125 Ct. Cl. 108, 111 F. Supp. 881.

No. 207. WATERHOUSE *v.* HOOVER ET AL. C. A. 6th Cir. Certiorari denied. *Robert Adair Black* and *John L. Vest* for petitioner. *Edward Hoover* for Hoover et al., respondents. Reported below: 203 F. 2d 171.

No. 208. HYDE PARK CLOTHES, INC. *v.* HYDE PARK FASHIONS, INC. C. A. 2d Cir. Certiorari denied. *Truman A. Herron* for petitioner. *Harold L. Tipton* for respondent. Reported below: 204 F. 2d 223.

No. 212. FORT DODGE, DES MOINES & SOUTHERN RAILROAD CO. ET AL. *v.* GILLESPIE, EXECUTRIX. C. A. 8th Cir. Certiorari denied. *Neill Garrett* and *Walter W. Selvy* for petitioners. *Paul Ahlers* for respondent. Reported below: 203 F. 2d 119.

No. 214. DAUGHERTY *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. *Edward T. Mancuso* for petitioner. *Edmund G. Brown*, Attorney General of California, and *Doris H. Maier*, Deputy Attorney General, for respondent. Reported below: 40 Cal. 2d 876, 256 P. 2d 911.

No. 215. MACIAS *v.* OAKLAND TRUCK SALES, INC. C. A. 3d Cir. Certiorari denied. Reported below: 203 F. 2d 205.

No. 216. FRITO COMPANY *v.* GENERAL MILLS, INC. C. A. 5th Cir. Certiorari denied. *J. L. Johannes* for petitioner. *Charles L. Byron* for respondent. Reported below: 202 F. 2d 936.

No. 218. UNITED STATES *v.* NELSON ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Acting Solicitor General Davis* for the United States. *T. Edward O'Connell* and *Edward Bennett Williams* for respondents. Reported below: 93 U. S. App. D. C. —, 208 F. 2d 505.

No. 219. UNITED STATES *v.* ARCADE COMPANY ET AL. C. A. 6th Cir. Certiorari denied. *Acting Solicitor General Davis* for the United States. *F. A. Berry* for respondents. Reported below: 203 F. 2d 230.

No. 221. ATLANTIC FREIGHT LINES, INC. *v.* SUMMERFIELD, POSTMASTER GENERAL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Edward Dumbauld* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Burger, Samuel D. Slade* and *Benjamin Forman* for respondent. Reported below: 92 U. S. App. D. C. 195, 204 F. 2d 64.

No. 227. DORAN *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Robert Sheriffs Moss, F. Trowbridge vom Baur* and *Louis P. Haffer* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 92 U. S. App. D. C. 305, 205 F. 2d 717.

No. 231. BUTZMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Michael Leo Looney* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Holland, Ellis N. Slack* and *Fred G. Folsom* for the United States. Reported below: 205 F. 2d 343.

No. 233. SAINT MATTHEWS GAS & ELECTRIC SHOP, INC. *v.* VERKAMP CORPORATION. C. A. 6th Cir. Certiorari denied. *Henry J. Burt, Jr.* for petitioner. Reported below: 207 F. 2d 502.

No. 239. GREAGER *v.* R. H. LINDSAY CO. C. A. 10th Cir. Certiorari denied. *Alden T. Hill* for petitioner. *Charles J. Moynihan* for respondent. Reported below: 204 F. 2d 129.

No. 240. Sears, Roebuck & Co. *v.* Marzall (Watson Substituted), Commissioner of Patents. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Frank H. Marks, C. Willard Hayes* and *Ivan P. Tashof* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Burger, Samuel D. Slade* and *Benjamin Forman* for respondent. Reported below: 92 U. S. App. D. C. 134, 204 F. 2d 32.

No. 242. Shipowners & Merchants Tugboat Co. *v.* United States. C. A. 9th Cir. Certiorari denied. *Lloyd M. Tweedt* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Burger, Samuel D. Slade, Leavenworth Colby* and *Benjamin Forman* for the United States. Reported below: 205 F. 2d 352.

No. 251. Brune *v.* New Jersey. Supreme Court of New Jersey. Certiorari denied. *Frank B. Bozza* for petitioner. *Edward Gaulkin* and *C. William Caruso* for respondent. Reported below: 12 N. J. 445, 97 A. 2d 201.

No. 261. Gross Income Tax Division, Indiana Department of State Revenue, et al. *v.* Surface Combustion Corp. Supreme Court of Indiana. Certiorari denied. *Edwin K. Steers,* Attorney General of Indiana, and *John J. McShane, Lloyd C. Hutchinson, Earl E. Schmadel* and *George B. Hall,* Deputy Attorneys General, for petitioners. *Arthur L. Gilliom, Robert D. Armstrong* and *Elbert R. Gilliom* for respondent. Reported below: 232 Ind. 100, 111 N. E. 2d 50.

No. 262. Gross Income Tax Division, Indiana Department of State Revenue, et al. *v.* Surface Combustion Corp. Supreme Court of Indiana. Certiorari

denied. *Edwin K. Steers*, Attorney General of Indiana, and *John J. McShane, Lloyd C. Hutchinson, Earl E. Schmadel* and *George B. Hall*, Deputy Attorneys General, for petitioners. *Arthur L. Gilliom, Robert D. Armstrong* and *Elbert R. Gilliom* for respondent. Reported below: 232 Ind. 100, 111 N. E. 2d 50.

No. 273. U. S. Printing & Novelty Co., Inc. et al. *v.* Federal Trade Commission. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Horace J. Donnelly, Jr.* for petitioners. *Acting Solicitor General Stern, Assistant Attorney General Barnes* and *Earl W. Kintner* for respondent. Reported below: 92 U. S. App. D. C. 298, 204 F. 2d 737.

No. 21. Sinclair et al. *v.* Texas. Court of Criminal Appeals of Texas. Certiorari denied. *James H. Martin* for petitioners. *John Ben Shepperd*, Attorney General of Texas, and *J. Milton Richardson, John Atchison* and *William M. King*, Assistant Attorneys General, for respondent. Reported below: 159 Tex. Cr. R. —, 261 S. W. 2d 167.

No. 88. Jones *v.* Texas. Court of Criminal Appeals of Texas. Certiorari denied. *James H. Martin* and *Travis Kirk* for petitioner. *John Ben Shepperd*, Attorney General of Texas, *John Davenport* and *David Beerbower*, Assistant Attorneys General, and *Henry Wade* for respondent. Reported below: 159 Tex. Cr. R. —, 261 S. W. 2d 161.

No. 134. Busch Jewelry Co. et al. *v.* State Board of Optometry. Supreme Court of Mississippi. Certiorari denied. *M. B. Montgomery* for petitioners. *Richard A. Billups, Jr.* for respondent. Reported below: 216 Miss. 475, 62 So. 2d 770.

No. 148. SICA *v.* CALIFORNIA. District Court of Appeal of California, Second Appellate District. Certiorari denied. *Russell E. Parsons* for petitioner. Reported below: 116 Cal. App. 2d 59, 253 P. 2d 75.

No. 164. GOLDBAUM ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Irvin Goldstein* for petitioners. *Acting Solicitor General Stern, Assistant Attorney General Holland, Ellis N. Slack, Meyer Rothwacks* and *Joseph M. Howard* for the United States. Reported below: 204 F. 2d 74.

No. 73. FELLER *v.* BROWNELL, ATTORNEY GENERAL, SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN. C. A. 3d Cir. Certiorari denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application. *Daniel S. Ring, Thomas N. Griggs* and *Harry S. Barger* for petitioner. *Acting Solicitor General Davis, Assistant Attorney General Townsend, James D. Hill* and *George B. Searls* for respondent. Reported below: 201 F. 2d 670.

No. 99. NATIONAL MACHINE WORKS, INC. ET AL. *v.* UNITED STATES. Court of Claims. Certiorari denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application. *Donald O. Lincoln* for petitioners. *Acting Solicitor General Davis, Assistant Attorney General Burger, Samuel D. Slade* and *Cornelius J. Peck* for the United States. Reported below: 124 Ct. Cl. 95, 109 F. Supp. 402.

No. 84. NETZER *v.* NORTHERN PACIFIC RAILWAY CO. Supreme Court of Minnesota. Motion for leave to file brief of Brotherhood of Railroad Trainmen, as *amicus curiae*, denied. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that the mo-

tion and petition should be granted. *Harry H. Peterson* and *William A. Tautges* for petitioner. *M. L. Countryman, Jr.* for respondent. Reported below: 238 Minn. 416, 57 N. W. 2d 247.

No. 93. TOBIN, SECRETARY OF LABOR, ET AL. *v.* LITTLE ROCK PACKING CO. ET AL. C. A. 8th Cir. Durkin substituted as a party petitioner for Tobin. Certiorari denied. *Acting Solicitor General Stern* and *Jeter S. Ray* for petitioners. *Grover T. Owens* and *E. L. McHaney, Jr.* for respondents. Reported below: 202 F. 2d 234.

No. 220. PERKO ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that the petition for writ of certiorari should be granted. *Edward L. Boyle* for petitioners. *Acting Solicitor General Stern, Assistant Attorney General Morton* and *Thomas L. McKevitt* for the United States. Reported below: 204 F. 2d 446.

No. 125. GRAHAM *v.* ALCOA STEAMSHIP CO., INC. C. A. 3d Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion certiorari should be granted. *Paul M. Goldstein* for petitioner. Reported below: 201 F. 2d 423.

No. 133. MASTERSON ET AL. *v.* PERGAMENT ET AL. C. A. 6th Cir. Motion for leave to file brief of Kaiser-Frazer Stockholders Protective Committee, as *amicus curiae*, denied. Certiorari denied. *Lemuel B. Schofield, Lewis M. Dabney, Jr.* and *Murray C. Bernays* for Masterson et al., *Samuel Marion* for Lefker, *Robert S. Marx* for Otis & Co., and *Clair John Killoran* for Lefker et al., petitioners. *Theodore E. Rein* and *Bernard T. Hecht* for Pergament et al.; *George E. Brand* and *Gordon Johnson* for the Kaiser Aluminum & Chemical Corpora-

tion; *Rockwell T. Gust* for Frazer et al., and *Harold J. Gallagher* for the Kaiser-Frazer Corporation, respondents. Reported below: 203 F. 2d 315.

No. 113. CORONA DAILY INDEPENDENT ET AL. *v.* CITY OF CORONA. District Court of Appeal of California, Fourth Appellate District. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that the petition for writ of certiorari should be granted. Memorandum filed by MR. JUSTICE DOUGLAS with whom MR. JUSTICE BLACK concurs. *Frank Taylor Cotter* for petitioners. *John T. Ganahl* for respondent. Reported below: 115 Cal. App. 2d 382, 252 P. 2d 56.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK concurs.

I dissent from a denial of certiorari in this case.

Petitioners publish a newspaper in Corona, California. The city has by ordinance imposed a license tax for the privilege of engaging in any business in the city, including the business of publishing a newspaper. Petitioners refused to pay the license fee, and the California courts have held that they may be compelled to do so.

We said in *Murdock* v. *Pennsylvania*, 319 U. S. 105, 113, that "A state may not impose a charge for the enjoyment of a right granted by the Federal Constitution. Thus, it may not exact a license tax for the privilege of carrying on interstate commerce (*McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33, 56–58), although it may tax the property used in, or the income derived from, that commerce, so long as those taxes are not discriminatory. *Id.*, p. 47 and cases cited. A license tax applied to activities guaranteed by the First Amendment would have the same destructive effect. It is true that the First Amendment, like the commerce clause, draws no distinction between license taxes, fixed sum taxes, and other kinds of taxes. But

that is no reason why we should shut our eyes to the nature of the tax and its destructive influence. The power to impose a license tax on the exercise of these freedoms is indeed as potent as the power of censorship which this Court has repeatedly struck down."

The license tax involved here is a privilege tax in fact as well as in form—"a flat tax imposed on the exercise of a privilege granted by the Bill of Rights." 319 U. S., at p. 113. No government can exact a price for the exercise of a privilege which the Constitution guarantees.

No. 139. BERTEL ET AL. *v.* PANAMA TRANSPORT CO. ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE JACKSON are of the opinion certiorari should be granted. *Robert M. Benjamin* and *Abraham Fishbein* for petitioners. *Ira A. Campbell* for respondents. Reported below: 202 F. 2d 247.

No. 159. JOHNS *v.* ASSOCIATED AVIATION UNDERWRITERS ET AL. C. A. 5th Cir. Certiorari denied. *Fred W. Moore* for petitioner. *Denman Moody* for respondents. Reported below: 203 F. 2d 208.

No. 172. CHESAPEAKE & OHIO RAILWAY CO. *v.* VAN LIEROP. Supreme Court of Michigan. Certiorari denied. MR. JUSTICE REED took no part in the consideration or decision of this application. *William E. Miller* for petitioner. *H. Clair Jackson* and *William L. Fitzgerald* for respondent. Reported below: 335 Mich. 702, 57 N. W. 2d 431.

No. 175. HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, LOCAL NO. 181, ET AL. *v.* BLUE BOAR CAFETERIA CO., INC. Court of Appeals of Kentucky. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that the petition for writ of certiorari

should be granted. *J. W. Brown* for petitioners. *Robert E. Hatton* for respondent. Reported below: 254 S. W. 2d 335.

No. 191. FRANCIS *v.* CRAFTS. C. A. 1st Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that the petition for writ of certiorari should be granted. *Isadore H. Y. Muchnick* for petitioner. *W. Barton Leach* for respondent. Reported below: 203 F. 2d 809.

No. 181. DARGEL ET AL. *v.* BARR, ACTING DIRECTOR OF RENT STABILIZATION, ET AL. United States Emergency Court of Appeals. Sherrard, Director of Defense Rental Areas Division, Office of Defense Mobilization, substituted as a party respondent for Barr, Acting Director of Rent Stabilization. Certiorari denied. *Robert A. Kahn* for petitioners. *Acting Solicitor General Stern* and *Charles P. Liff* filed a memorandum for the Director of Defense Rental Areas Division, Office of Defense Mobilization, suggesting that the case has become moot. Reported below: 204 F. 2d 697.

No. 211. PRUDENCE-BONDS CORPORATION (NEW CORPORATION), SUCCESSOR TRUSTEE, ET AL. *v.* STATE STREET TRUST CO., TRUSTEE. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE JACKSON took no part in the consideration or decision of this application. *Charles M. McCarty* and *Geo. C. Wildermuth* for the Prudence-Bonds Corporation, *Samuel Silbiger* for Eddy, and *Aaron Schwartz* for Beardsley, petitioners. *John Graham Brooks*, *A. Donald MacKinnon* and *William Eldred Jackson* for respondent. Reported below: 202 F. 2d 555.

No. 234. STRUCK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BLACK is of the opinion

certiorari should be granted. *David T. Berman* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 7, Misc. JONES *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. *Frank C. Biggs* for petitioner. *John Ben Shepperd*, Attorney General of Texas, and *Horace Wimberly*, Assistant Attorney General, for respondent. Reported below: 159 Tex. Cr. R. —, 261 S. W. 2d 317.

No. 10, Misc. DEWEESE *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 12, Misc. FLOWERS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 15, Misc. NEAL *v.* RANDOLPH, WARDEN. Circuit Court of Randolph County, Illinois. Certiorari denied.

No. 16, Misc. MEINER *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 18, Misc. REHAK *v.* KEENAN, SUPERINTENDENT, ALLEGHENY COUNTY WORKHOUSE, ET AL. Supreme Court of Pennsylvania, Western District. Certiorari denied.

No. 20, Misc. MAHURIN *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied.

No. 21, Misc. MARTIN *v.* SKEEN, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 22, Misc. SHAMERY *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 415 Ill. 177, 112 N. E. 2d 466.

No. 24, Misc. KOALSKA *v.* SWENSON, WARDEN. Supreme Court of Minnesota. Certiorari denied.

No. 25, Misc. TINGLEY *v.* McDOWELL, SHERIFF. Court of Appeals of Alabama. Certiorari denied. *G. Ernest Jones, Jr.* and *G. Ernest Jones, Sr.* for petitioner. Reported below: 36 Ala. App. 665, 63 So. 2d 712.

No. 26, Misc. HALL *v.* SKEEN, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 29, Misc. DeWOLF *v.* WATERS, WARDEN. C. A. 10th Cir. Certiorari denied. *C. A. Summers* for petitioner. Reported below: 205 F. 2d 234.

No. 30, Misc. KALAN *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 31, Misc. HOBSON *v.* CRANOR, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 32, Misc. WEST *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 33, Misc. DAVIS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 415 Ill. 234, 112 N. E. 2d 484.

No. 34, Misc. SWEENEY *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se*. *John J. O'Brien* for respondent.

No. 35, Misc. TILGHMAN *v.* FLORIDA. Supreme Court of Florida. Certiorari denied. Reported below: 64 So. 2d 555.

No. 36, Misc. CONGRO *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. Reported below: 12 N. J. 378, 97 A. 2d 10.

No. 38, Misc. CANLER *v.* INDIANA. Supreme Court of Indiana. Certiorari denied. Reported below: 232 Ind. 209, 111 N. E. 2d 710.

No. 39, Misc. MARTIN *v.* WALKER, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 203 F. 2d 563.

No. 47, Misc. ADAMS *v.* RANDOLPH, WARDEN. Circuit Court of Randolph County, Illinois. Certiorari denied.

No. 48, Misc. ALVIN *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 50, Misc. NOR WOODS *v.* TEETS, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 51, Misc. YELVINGTON *v.* LOONEY, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 53, Misc. MORRIS *v.* SKEEN, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 55, Misc. SISK *v.* INDIANA. Supreme Court of Indiana. Certiorari denied. Reported below: 232 Ind. 214, 110 N. E. 2d 627.

No. 58, Misc. SMITH, ADMINISTRATRIX, *v.* BALTIMORE & OHIO RAILROAD CO. C. A. 6th Cir. Certiorari denied. *Paul M. Herbert* for petitioner. *E. H. Burgess* and *Kenneth H. Ekin* for respondent. Reported below: 204 F. 2d 162.

No. 60, Misc. COOPER *v.* CRANOR, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 203 F. 2d 833.

No. 66, Misc. MUNROE *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 68, Misc. SHIELDS *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 69, Misc. BAYER *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 70, Misc. HARMON *v.* CRANOR, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 71, Misc. TERRY *v.* TEETS, WARDEN. Supreme Court of California. Certiorari denied.

No. 72, Misc. BARR *v.* WARDEN OF THE MARYLAND HOUSE OF CORRECTION. Court of Appeals of Maryland. Certiorari denied. Reported below: 202 Md. 643, 96 A. 2d 494.

No. 75, Misc. CLARK *v.* SKEEN, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 79, Misc. PETZ *v.* NEW YORK. County Court of Kings County, New York. Certiorari denied.

No. 80, Misc. JOHNSON *v.* TEETS, WARDEN. Supreme Court of California. Certiorari denied.

No. 83, Misc. CONNOLLY *v.* CRANOR, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 84, Misc. BROWN *v.* WASHINGTON. Supreme Court of Washington. Certiorari denied.

No. 85, Misc. COATES *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied. Reported below: 337 Mich. 56, 59 N. W. 2d 83.

No. 87, Misc. SHUBERT *v.* RANDOLPH, WARDEN. Circuit Court of Randolph County, Illinois. Certiorari denied.

No. 88, Misc. BUTZ *v.* REDNOUR. Circuit Court of Williamson County, Illinois. Certiorari denied.

No. 89, Misc. WESTBERRY *v.* FLORIDA. Supreme Court of Florida. Certiorari denied.

No. 90, Misc. LESSER *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Reported below: 305 N. Y. 569, 111 N. E. 2d 442.

No. 91, Misc. CURTIS *v.* SKEEN, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 4, Misc. DARGAN *v.* YELLOW CAB CO. ET AL. C. A. 3d Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion certiorari should be granted. *Leslie S. Perry* for petitioner. *Charles K. Robinson* for the Yellow Cab Company, respondent. Reported below: 200 F. 2d 302.

No. 27, Misc. STAPLES *v.* RANDOLPH, WARDEN. Petition for writ of certiorari to the Circuit Court of Randolph County, Illinois, denied for the reason that the application therefor was not made within the time provided by law.

No. 40, Misc. YOUNG *v.* MAY, SUPERINTENDENT, ILLINOIS SECURITY HOSPITAL. Petition for writ of certiorari to the Circuit Court of Randolph County, Illinois, denied for the reason that the application therefor was not made within the time provided by law.

No. 43, Misc. READER *v.* ILLINOIS. Petition for writ of certiorari to the Supreme Court of Illinois denied for the reason that the application therefor was not made within the time provided by law.

No. 63, Misc. CLARK *v.* MICHIGAN. Petition for writ of certiorari to the Supreme Court of Michigan denied for the reason that the application therefor was not made within the time provided by law.

No. 78, Misc. BARTHOLOMEW *v.* ILLINOIS. Petition for writ of certiorari to the Supreme Court of Illinois denied for the reason that the application therefor was not made within the time provided by law.

Rehearing Denied.

No. 517, October Term, 1952. BARROWS ET AL. *v.* JACKSON, 346 U. S. 249. Rehearing denied. MR. JUSTICE REED and MR. JUSTICE JACKSON took no part in the consideration or decision of this application.

No. 602, October Term, 1952. THEODORAKIS *v.* XILAS ET AL., 345 U. S. 936. Second petition for rehearing denied.

No. 308, October Term, 1952. DALEHITE ET AL. *v.* UNITED STATES, 346 U. S. 15. Petitions for rehearing denied. MR. JUSTICE DOUGLAS and MR. JUSTICE CLARK took no part in the consideration or decision of these applications.

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No. 391, October Term, 1952. STEIN *v.* NEW YORK, 346 U. S. 156;

No. 393, October Term, 1952. COOPER *v.* NEW YORK, 346 U. S. 156;

No. 392, October Term, 1952. WISSNER *v.* NEW YORK, 346 U. S. 156;

No. 681, October Term, 1952. CAMMARATA *v.* OHIO, 345 U. S. 998;

No. 682, October Term, 1952. COOPER *v.* PEAK ET AL., 345 U. S. 957;

No. 724, October Term, 1952. ESTEP ET UX. *v.* ILLINOIS, 345 U. S. 970;

No. 742, October Term, 1952. PATTERSON *v.* SAUNDERS ET AL., 345 U. S. 998;

No. 759, October Term, 1952. SKOVGAARD *v.* UNITED STATES, 345 U. S. 994;

No. 791, October Term, 1952. NEAL *v.* UNITED STATES, 345 U. S. 996;

No. 792, October Term, 1952. DAVIS *v.* UNITED STATES, 345 U. S. 996;

No. 793, October Term, 1952. WISMILLER *v.* ESTATE OF GARRETT, 345 U. S. 996;

No. 808, October Term, 1952. PATTISON ET AL. *v.* UNION CENTRAL LIFE INSURANCE CO., 345 U. S. 996;

No. 812, October Term, 1952. GENERAL MOTORS CORP. ET AL. *v.* ACKERMANS, 345 U. S. 996;

No. 820, October Term, 1952. U. S. A. C. TRANSPORT, INC., ALSO DOING BUSINESS AS U. S. AIRPLANE TRANSPORT, INC., *v.* UNITED STATES, 345 U. S. 997;

No. 836, October Term, 1952. 24 DIGGER MERCHANDISING MACHINES ET AL. *v.* UNITED STATES, 345 U. S. 998; and

No. 843, October Term, 1952. KRAUSE ET AL. *v.* BUCHER, 345 U. S. 997. Petitions for rehearing denied.

No. 634, October Term, 1952. UNITED STATES *v.* GRAINGER;

No. 635, October Term, 1952. UNITED STATES *v.* CLAVERE ET AL.; and

No. 636, October Term, 1952. UNITED STATES *v.* CLAVERE ET AL., 346 U. S. 235. Rehearing denied. MR. JUSTICE JACKSON took no part in the consideration or decision of this application.

No. 404, Misc., October Term, 1952. WHITE *v.* UNITED STATES, 345 U. S. 999;

No. 495, Misc., October Term, 1952. THOMAS *v.* CALIFORNIA, 345 U. S. 1000;

No. 498, Misc., October Term, 1952. PICKING ET AL. *v.* PENNSYLVANIA RAILROAD CO. ET AL., 345 U. S. 1000;

No. 501, Misc., October Term, 1952. BOZELL *v.* UNITED STATES ET AL., 345 U. S. 977;

No. 506, Misc., October Term, 1952. CROSS *v.* SUPREME COURT OF CALIFORNIA, 345 U. S. 990;

No. 511, Misc., October Term, 1952. LEE *v.* TENNESSEE, 345 U. S. 1003;

No. 516, Misc., October Term, 1952. IN RE JERONIS, 345 U. S. 990;

No. 529, Misc., October Term, 1952. SCHELL *v.* EIDSON, WARDEN, 345 U. S. 1001; and

No. 548, Misc., October Term, 1952. SEVERA *v.* MCCORKLE, ACTING WARDEN, 345 U. S. 990. Petitions for rehearing denied.

No. 372, Misc., October Term, 1952. SEVERA *v.* NEW JERSEY, 345 U. S. 929. Third and fourth petitions for rehearing denied.

No. 388, Misc., October Term, 1952. HOURIHAN *v.* NATIONAL LABOR RELATIONS BOARD ET AL., 345 U. S. 930. Second petition for rehearing denied.

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No. 422, October Term, 1952. BURNS ET AL. *v.* WILSON, SECRETARY OF DEFENSE, ET AL., 346 U. S. 137. Rehearing denied. Separate opinion filed by MR. JUSTICE FRANKFURTER.

Opinion of MR. JUSTICE FRANKFURTER.

Further study and reflection have reinforced the conviction I expressed last June—and on even broader grounds than I then indicated—that this case should be set down for reargument. Fundamental issues which have neither been argued by counsel nor considered by the Court are here involved. On such important questions, the military authorities, the bar, and the lower courts (including the Court of Military Appeals) ought not to be left with the inconclusive determination which our disposition of the case last June implies. One has a right to assume that there is greater likelihood of securing agreement of views for a Court opinion at the beginning than at the end of a term.

First. One of these problems concerns the effect of recent developments in the scope of inquiry on habeas corpus upon the relationship of the federal district courts in their habeas corpus jurisdiction to courts-martial. If the main opinion stands, matters which are open for inquiry on collateral attack upon a judgment of conviction entered in a United States District Court, a constitutional tribunal, will be foreclosed from inquiry when the judgment of conviction collaterally assailed is that of a court-martial, an executive tribunal of limited jurisdiction *ad hoc* in nature. This has not been the law up to now; and the assertion that "in military habeas corpus the inquiry, the scope of matters open for review, has always been more narrow than in civil cases" (346 U. S., at 139), is, I respectfully submit, demonstrably incorrect.

1. The first case in this Court involving the collateral attack, by habeas corpus, on the judgment of a court-martial was *Ex parte Reed*, 100 U. S. 13. Here is the test there laid down (100 U. S., at 23):

> "The court had jurisdiction over the person and the case. It is the organism provided by law and clothed with the duty of administering justice in this class of cases. Having had such jurisdiction, its proceedings cannot be collaterally impeached for any mere error or irregularity, if there were such, committed within the sphere of its authority. Its judgments, when approved as required, rest on the same basis, and are surrounded by the same considerations which give conclusiveness to the judgments of other legal tribunals, including as well the lowest as the highest, under like circumstances. The exercise of discretion, within authorized limits, cannot be assigned for error and made the subject of review by an appellate court."

It was thus clearly stated that the standard for collateral consideration of judgments of courts-martial is the same as that applied on collateral consideration of judgments of other tribunals. Once "jurisdiction" is shown to exist, the inquiry ends; the question is not whether that jurisdiction was well or wisely exercised, or whether error was committed, it is only whether there was power to act at all.

This was always the traditional scope of inquiry when the judgment sought to be examined on habeas corpus was that of a federal or territorial or District of Columbia court. *E. g., Matter of Moran*, 203 U. S. 96 (Oklahoma territorial court; opinion by Holmes, J.); *Harlan* v. *McGourin*, 218 U. S. 442 (U. S. circuit court; opinion by Day, J.); *Matter of Gregory*, 219 U. S. 210 (District of Columbia court; opinion by Hughes, J., with copious citation of authority).

And so, in the earlier cases scrutinizing military sentences by habeas corpus, it was similarly laid down that "The single inquiry, the test, is jurisdiction." *In re Grimley*, 137 U. S. 147, 150. "Courts martial are lawful tribunals, with authority to finally determine any case over which they have jurisdiction, and their proceedings, when confirmed as provided, are not open to review by the civil tribunals, except for the purpose of ascertaining whether the military court had jurisdiction of the person and subject-matter, and whether, though having such jurisdiction, it had exceeded its powers in the sentence pronounced." *Carter* v. *Roberts*, 177 U. S. 496, 498; *Carter* v. *McClaughry*, 183 U. S. 365, 380–381; *Grafton* v. *United States*, 206 U. S. 333, 347–348. Allegations of irregularity or illegality in the composition of courts-martial were, of course, rigorously scrutinized (*e. g.*, *McClaughry* v. *Deming*, 186 U. S. 49; cf. *Kahn* v. *Anderson*, 255 U. S. 1); but apart from this obvious amenability to judicial inquiry, the judgment of a court-martial meeting the test above quoted was unassailable even by the most extreme allegations of prejudice, unfairness, and use of perjured testimony. See *Carter* v. *Woodring*, 67 App. D. C. 393, 92 F. 2d 544.

Thus, up to December 6, 1937, when the Court denied certiorari (302 U. S. 752) in the case last cited—it was the last of Oberlin Carter's long series of attempts at judicial review of his court-martial—the scope of habeas corpus in both military and civil cases was equally narrow: in both classes of cases it was limited solely to questions going to the "jurisdiction" of the sentencing court.

2. Later in the 1937 Term, *Johnson* v. *Zerbst*, 304 U. S. 458, was decided and blazed a new trail. It was held that procedural errors—what theretofore were deemed matters not going to the defined constitution of the tribunal acting

within the scope of its power over subject matter and persons—may be inquired into collaterally on habeas corpus, if they amounted to a deprivation of constitutional right. By giving a new content to "jurisdiction," the case was brought within the formula that only "jurisdiction" may be the subject of inquiry in habeas corpus. The judgment successfully assailed in that case was one entered in a United States District Court. Since 1938 the basic premise of *Johnson* v. *Zerbst* has been neither questioned nor limited in any instance involving collateral attack, by way of habeas corpus, on judgments of conviction entered by a civil court.

3. The effect of *Johnson* v. *Zerbst* on judgments of conviction pronounced by a court-martial first appears to have been considered in *Shapiro* v. *United States*, 107 Ct. Cl. 650, 69 F. Supp. 205. There the Court of Claims applied *Johnson* v. *Zerbst* to invalidate a conviction by an otherwise properly constituted court-martial, on the ground that the unreasonably short time permitted the accused to prepare his defense deprived him of the effective assistance of counsel in violation of the Sixth Amendment. The court-martial was held to have lost "jurisdiction" to proceed. For purposes of the pending Petition for Rehearing and our responsibility for adequate consideration of the issues, it is pertinent that the *Shapiro* case was not cited to us in any of the briefs in the present case.

Later decisions in the Court of Claims, where of course collateral attack is by way of a petition for back pay resting on allegations that the assailed court-martial proceedings were void, have followed the rationale of the *Shapiro* case. Thus, in *Sima* v. *United States*, 119 Ct. Cl. 405, 426, 96 F. Supp. 932, 938, the court said: "From the entire record in this case, we cannot say that plaintiff was deprived of his rights under the Fifth and Sixth

Amendments to the Constitution of the United States to the extent that the verdict of the court-martial was void." And in *Fly* v. *United States*, 120 Ct. Cl. 482, 498, 100 F. Supp. 440, 442: "Only when the errors committed are so gross as to amount to a denial of due process does the erring court martial lose its jurisdiction and its power to issue a valid decree. Compare *Sima* v. *United States*, with *Shapiro* v. *United States*, both *supra*."

4. This Court has never considered the applicability of *Johnson* v. *Zerbst* to military habeas corpus cases. But if denial of the right to counsel makes a civil body legally nonexistent, *i. e.*, without "jurisdiction," so as to authorize habeas corpus, by what process of reasoning can a military body denying such right to counsel fail to be equally nonexistent legally speaking, *i. e.*, without "jurisdiction," so as to authorize habeas corpus? Again, if a denial of due process deprives a civil body of "jurisdiction," is not a military body equally without "jurisdiction" when it makes such a denial, whatever the requirements of due process in the particular circumstances may be?

It is true that in *Hiatt* v. *Brown*, 339 U. S. 103, the traditional older rule on military habeas corpus was restated and applied, and that we there disapproved the tendency of some of the lower federal courts to review court-martial records collaterally as if the habeas corpus court were a statutory agency of direct military appellate review in the Judge Advocate General's office, *e. g.*, *Hicks* v. *Hiatt*, 64 F. Supp. 238 (M. D. Pa.). But the present problem was never suggested and never considered by us. Neither the Government's petition for certiorari nor its briefs cited *Johnson* v. *Zerbst*; and the respondent argued the point only inferentially until after the case went against him. The case cannot be deemed authority for an important point not discussed or considered. But assuredly *Hiatt* v. *Brown* does not sustain the proposition for which it was cited in this case, 346 U. S., at 139, that

"in military habeas corpus the inquiry, the scope of matters open for review, has always been more narrow than in civil cases." [1]

5. In coming to this conclusion, the main opinion purported to derive some comfort from the "finality" provision of the 1948 Articles of War and of the Uniform Code of Military Justice (AW 50 (h), 10 U. S. C. (Supp. II) § 1521 (h); UCMJ, Art. 76, 50 U. S. C. (Supp. V) § 663), both of which state in terms that court-martial proceedings, once appellate review is completed, "shall be binding upon all departments, courts, agencies, and officers of the United States." But the decision in *Estep* v. *United States*, 327 U. S. 114, should serve as a caution against applying provisions of "finality" in legislation as though we were dealing with words in a dictionary rather than

[1] The direction of the opinion may well have been influenced by the following assumption regarding this Court's relation to military law: "This Court has played no role in [the development of military law]; we have exerted no supervisory power over the courts which enforce it; . . ." (346 U. S., at 140). Of course it is true that we have no direct appellate jurisdiction over military courts. But it disregards both history and the statute books to say that our decisions have played no role in the development of military law. The pages of Winthrop are witness to the extent that the "Blackstone of American military law" (as General Crowder, Judge Advocate General of the Army from 1911 to 1923, called him) considered himself bound by this Court's pronouncements. Since 1920, Article of War 38 (10 U. S. C. (1926–1946 eds.) § 1509) has provided that the "modes of proof" in court-martial cases shall conform as nearly as practicable to the rules of evidence applicable to criminal cases in the United States district courts. Those rules of course are prescribed by this Court. In 1948 this language was expanded to include "principles of law" as well as rules of evidence (10 U. S. C. (Supp. II) § 1509), and our decisions have been frequently cited by the military, as indeed they were in this very case. The same broad language is now in Art. 36, UCMJ, 50 U. S. C. (Supp. V) § 611, and the judges of the U. S. Court of Military Appeals apparently consider themselves bound by what we say. See Brosman, The Court: Freer Than Most, 6 Vand. L. Rev. 166, 167.

statutory directions, to be interpreted in the light of juridical considerations. The legislative history of the Uniform Code of Military Justice strongly suggests that it was precisely in the realm of collateral judicial attack on courts-martial that the concept of "finality" was intended not to operate. Here is what both Armed Services Committees said of Article 76, UCMJ: "This article is derived from AW 50 (h) and is modified to conform to terminology used in this code. *Subject only to a petition for a writ of habeas corpus in Federal court*, it provides for the finality of court-martial proceedings and judgments." H. R. Rep. No. 491, 81st Cong., 1st Sess., p. 35; S. Rep. No. 486, 81st Cong., 1st Sess., p. 32. I have added the italics to emphasize the congressional agreement with our decision on the same point in *Gusik* v. *Schilder*, 340 U. S. 128, 132–133. If that case and the Committee Reports have any meaning at all, they mean that the "finality" provision is completely irrelevant to any consideration concerning the proper scope of inquiry in military habeas corpus cases.[2]

6. It is desirable to emphasize that I express no opinion whatever on whether the allegations of the petition in the case at bar are sufficient to sustain a collateral attack on the court-martial's judgment of conviction. Nor do I express any opinion on the weight which should be given by the federal district court on habeas corpus to the findings of the military reviewing authorities. These are

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[2] It is noteworthy, though it was not referred to in the briefs, that as a matter of administrative recognition this "finality" provision has not been read with dictionary literalness. See 41 Op. Atty. Gen., No. 8, Dec. 29, 1949, which holds that AW 50 (h) of 1948—the very provision involved in the present case—did not bar the reopening of a record of conviction by court-martial by a Departmental Board for the Correction of Records functioning pursuant to § 207 of the Legislative Reorganization Act of 1946 (5 U. S. C. §§ 191a, 275). The action of those boards required approval by the Secretary concerned.

matters to be canvassed on the reargument. The issue here is whether the rationale of *Johnson* v. *Zerbst* is now to be quietly discarded or whether it will be appropriately applied, as it has been by the lower courts, in the military sphere. I do not think it is asking too much to insist that we have well-focused argument and careful deliberation before enunciating the principle that a conviction by a constitutional court which lacked due process is open to attack by habeas corpus while an identically defective conviction when rendered by an *ad hoc* military tribunal is invulnerable.[3]

Second. There is another issue of broad importance which underlies this case but which has not been considered by the Court.

Both petitioners, alleging confinement in Japan (R. 1, 9) and American citizenship (*id.*), sought habeas corpus in the District of Columbia.

Thus there is raised squarely the question, thus far reserved by us (*Ahrens* v. *Clark*, 335 U. S. 188, 192, n. 4; *Johnson* v. *Eisentrager*, 339 U. S. 763, 790–791), whether an American citizen detained by federal officers outside of any federal judicial district, may maintain habeas corpus directed against the official superior of the officers actually having him in custody.

This question was originally answered squarely in the negative by the highest court of the District of Columbia. *McGowan* v. *Moody*, 22 App. D. C. 148 (detention on Guam, writ sought to be directed against the Secretary of the Navy). That precedent was followed as late as 1948 without question. *Ex parte Flick*, 76 F. Supp. 979 (D. D. C.), reversed on other grounds *sub nom. Flick* v. *Johnson*, 85 U. S. App. D. C. 70, 174 F. 2d 983. It may have been, and probably was, overruled by *Eisentrager* v.

[3] I say "*ad hoc*," not in any derogatory sense, but merely to put the matter in its proper setting. See Winthrop, Military Law and Precedents (2d ed. 1896), 53–54.

Forrestal, 84 U. S. App. D. C. 396, 174 F. 2d 961, which we in turn reversed for other reasons in *Johnson* v. *Eisentrager*, *supra*.

Petitioners have not discussed the question of jurisdiction, and the Government appears disinclined to argue it.

We should not permit a question of jurisdiction as far-reaching as this one to go by concession, or decide it *sub silentio*. I express no view on how we should determine the issue, or on what grounds, but I think that we should frankly face it, even at the risk of concluding that a legislative remedy is necessary. Cf. Wolfson, Americans Abroad and Habeas Corpus, 9 Fed. Bar J. 142, 10 *id.*, at 69. It is particularly important that we do so at this time when thousands of our citizens in uniform are serving overseas.

OCTOBER 19, 1953.

Per Curiam Decisions.

No. 169. WHEELER *v.* MISSISSIPPI. Appeal from the Supreme Court of Mississippi. *Per Curiam:* The appeal is dismissed for want of jurisdiction. 28 U. S. C. § 1257 (2). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari as required by 28 U. S. C. § 2103, certiorari is denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion certiorari should be granted. THE CHIEF JUSTICE took no part in the consideration or decision of this case. *W. Arlington Jones* for appellant. Reported below: — Miss. —, 63 So. 2d 517.

No. 229. HAINES ET AL., COMPRISING KEYSTONE POLICYHOLDERS' COMMITTEE, *v.* PENNSYLVANIA ET AL. Appeal from the Supreme Court of Pennsylvania, Middle District. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of jurisdiction. 28 U. S. C. § 1257 (2). Treating the papers whereon the

appeal was allowed as a petition for writ of certiorari as required by 28 U. S. C. § 2103, certiorari is denied. *Ellis G. Arnall* and *Cleburne E. Gregory, Jr.* for appellants. *D. Arthur Magaziner* for appellees. Reported below: 373 Pa. 105, 95 A. 2d 664.

Miscellaneous Orders.

No. 5, Original, October Term, 1950. NEW JERSEY *v.* NEW YORK ET AL. The motion of the City of New York for leave to file an amended petition to modify the decree is granted and the parties are allowed thirty days within which to answer the amended petition. *Denis M. Hurley, John P. McGrath, Jeremiah M. Evarts, James J. Thornton* and *Richard H. Burke* for the City of New York. *Theodore D. Parsons*, Attorney General, *Robert Peacock*, Deputy Attorney General, and *Kenneth H. Murray* for the State of New Jersey.

No. 540, October Term, 1952. UNITED STATES *v.* NUGENT; and

No. 573, October Term, 1952. UNITED STATES *v.* PACKER, 346 U. S. 1. Petition for rehearing denied. Motions to correct and for clarification of the opinion also denied. THE CHIEF JUSTICE and MR. JUSTICE JACKSON took no part in the consideration or decision of these applications.

No. 368, Misc., October Term, 1952. GOODMAN ET AL. *v.* MCMILLAN, TRUSTEE, ET AL., 345 U. S. 929. Petition for further consideration denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application.

No. 96, Misc. AHERN *v.* GREEN, SUPERINTENDENT, FAIRFIELD STATE HOSPITAL; and

No. 97, Misc. LUCAS *v.* HIATT, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

Certiorari Granted.

No. 241. TOM WE SHUNG *v.* BROWNELL, ATTORNEY GENERAL, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Jack Wasserman* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Olney, Beatrice Rosenberg* and *Felicia H. Dubrovsky* for respondents. Reported below: 93 U. S. App. D. C. —, 207 F. 2d 132.

Certiorari Denied. (*See also Nos. 169 and 229, supra.*)

No. 129. JONES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Sarsfield Collins* for petitioner. *Acting Solicitor General Davis, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 204 F. 2d 745.

No. 176. KELLEY *v.* ROHN, EXECUTOR. Supreme Court of Nebraska. Certiorari denied. *Ralph R. Bremers* for petitioner. *Thomas P. Leary* for respondent. Reported below: 156 Neb. 463, 56 N. W. 2d 711.

No. 213. M. & J. TRACY, INC. *v.* UNITED STATES. Court of Claims. Certiorari denied. *James S. Hays* and *William E. Grady, Jr.* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Burger, Paul A. Sweeney, Leavenworth Colby* and *Hubert H. Margolies* for the United States. Reported below: 125 Ct. Cl. 70, 111 F. Supp. 956.

No. 226. RECONSTRUCTION FINANCE CORP. *v.* HARRISONS & CROSFIELD, LTD., BY FRED PUSINELLI & CO., INC., AGENT. C. A. 2d Cir. Certiorari denied. *Acting Solicitor General Davis* for petitioner. *Francis A. Brick, Jr.* and *Burr F. Coleman* for respondent. Reported below: 204 F. 2d 366.

No. 232. CLARK *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. *John D. Cofer* for petitioner. *John Ben Shepperd*, Attorney General of Texas, and *Rudy G. Rice* and *Horace Wimberly*, Assistant Attorneys General, for respondent. Reported below: 159 Tex. Cr. R. —, 261 S. W. 2d 339.

No. 237. WEST TEXAS UTILITIES CO., INC. ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Thurman Arnold, Paul A. Porter, Norman Diamond* and *Frank Cain* for petitioners. *Acting Solicitor General Stern, George J. Bott, David P. Findling, Dominick L. Manoli* and *Winthrop A. Johns* for the National Labor Relations Board; and *Louis Sherman* for the International Brotherhood of Electrical Workers (AFL), respondents. Reported below: 92 U. S. App. D. C. 224, 206 F. 2d 442.

No. 243. ANDREWS BROS. OF CALIFORNIA *v.* CENTRAL PRODUCE CO. C. A. 6th Cir. Certiorari denied. *Benjamin W. Shipman* for petitioner. *Morton B. Howell, Jr.* for respondent. Reported below: 203 F. 2d 949.

No. 244. LIVESAY WINDOW CO., INC. *v.* LIVESAY INDUSTRIES, INC. ET AL. C. A. 5th Cir. Certiorari denied. *Charles R. Fenwick* and *Thomas B. Van Poole* for petitioner. *J. M. Flowers, Henry M. Sinclair, D. H. Redfearn* and *Ralph H. Ferrell* for respondents. Reported below: 202 F. 2d 378.

No. 246. BROWN, COUNTY TREASURER, ET AL. *v.* SUTTER BASIN CORP., LTD. Supreme Court of California. Certiorari denied. *Stephen W. Downey* and *Martin McDonough* for petitioners. *Harold F. Collins* for respondent. Reported below: 40 Cal. 2d 235, 253 P. 2d 649.

No. 247. National Labor Relations Board *v.* Mid-Continent Petroleum Corp. C. A. 6th Cir. Certiorari denied. *Acting Solicitor General Stern* and *George J. Bott* for petitioner. Reported below: 204 F. 2d 613.

No. 248. Schwegmann Brothers Giant Super Market et al. *v.* Eli Lilly & Co. C. A. 5th Cir. Certiorari denied. *John Minor Wisdom* and *Saul Stone* for petitioners. *Everett I. Willis* for respondent. Reported below: 205 F. 2d 788.

No. 250. New York, New Haven & Hartford Railroad Co. *v.* Leary. C. A. 1st Cir. Certiorari denied. *Paul F. Perkins* and *Charles W. Bartlett* for petitioner. *Thomas J. O'Neill* and *John V. Higgins* for respondent. Reported below: 204 F. 2d 461.

No. 252. Universal Manufacturing Co. et al. *v.* Federal Trade Commission. C. A. 10th Cir. Certiorari denied. *J. L. London* for petitioners. *Acting Solicitor General Stern, Assistant Attorney General Barnes* and *Earl W. Kintner* for respondent. Reported below: 204 F. 2d 272.

No. 253. Bush Terminal Buildings Co. *v.* Commissioner of Internal Revenue. C. A. 2d Cir. Certiorari denied. *Holt S. McKinney* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Holland, Ellis N. Slack* and *Cecelia H. Goetz* for respondent. Reported below: 204 F. 2d 575.

No. 255. Strickland Transportation Co., Inc. *v.* United States. C. A. 5th Cir. Certiorari denied. *Frank A. Leffingwell* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Burger, Paul A. Sweeney* and *Hubert H. Margolies* for the United States. Reported below: 204 F. 2d 325.

No. 257. JONES *v.* LYKES BROTHERS STEAMSHIP CO., INC. C. A. 2d Cir. Certiorari denied. *Charles Andrews Ellis* and *Silas Blake Axtell* for petitioner. *Arthur M. Boal* for respondent. Reported below: 204 F. 2d 815.

No. 258. UNITED STATES EX REL. CARROLLO *v.* BODE, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 8th Cir. Certiorari denied. *Richard P. Shanahan* and *James Daleo* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for respondent. Reported below: 204 F. 2d 220.

No. 259. BANKS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Joseph B. Keenan* and *Alvin O. West* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Holland, Ellis N. Slack* and *Murray L. Schwartz* for the United States. Reported below: 204 F. 2d 666.

No. 177. MCELROY *v.* MCELROY; and

No. 245. MCELROY *v.* COBOURN ET AL., DOING BUSINESS AS COBOURN, YAGER, NOTNAGEL, SMITH & MORAN. Court of Appeals of Ohio, Sixth Appellate District. Certiorari denied.

No. 190. INTERNATIONAL WORKERS ORDER, INC. *v.* NEW YORK, BY BOHLINGER, SUPERINTENDENT OF INSURANCE, ET AL.; and

No. 283. SELIGSON ET AL. *v.* NEW YORK, BY BOHLINGER, SUPERINTENDENT OF INSURANCE. Court of Appeals of New York. Certiorari denied. MR. JUSTICE CLARK took no part in the consideration or decision of these applications. *Osmond K. Fraenkel, Frank J. Donner* and *Arthur Kinoy* for petitioner in No. 190. *Milton H. Friedman* and *Thomas Russell Jones* for petitioners in No. 283. *Paul W. Williams* and *James B. Henry, Jr.*,

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Special Assistant Attorneys General, for New York, by Bohlinger, Superintendent of Insurance, respondent. Reported below: 305 N. Y. 258, 112 N. E. 2d 280.

No. 235. TAWES *v.* CIE. DES MESSAGERIES MARITIMES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion the petition should be granted. *Cicero C. Sessions* for petitioner. *Barent Ten Eyck, Edwin Longcope* and *Samuel T. Frankel* for respondent. Reported below: 205 F. 2d 5.

No. 249. DAL SANTO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion the petition should be granted. *Hayden C. Covington* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Olney, Beatrice Rosenberg* and *Carl H. Imlay* for the United States. Reported below: 205 F. 2d 429.

No. 254. IN RE LEVINE. Supreme Court of Pennsylvania, Western District. Certiorari denied. MR. JUSTICE BLACK is of the opinion certiorari should be granted. *Orville Brown* for petitioner. *Alvah M. Shumaker* for Braham, Presiding Judge, respondent. Reported below: 372 Pa. 612, 95 A. 2d 222.

No. 9, Misc. KEMMERER *v.* WARDEN, MICHIGAN STATE PENITENTIARY. C. A. 6th Cir. Certiorari denied.

No. 14, Misc. HELMS ET AL. *v.* UNIVERSAL ATLAS CEMENT CO. C. A. 5th Cir. Certiorari denied. *John McGlasson* for petitioners. *O. F. Jones, Jr.* for respondent. Reported below: 202 F. 2d 421.

No. 37, Misc. HAMILTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Acting*

Solicitor General Stern, Assistant Attorney General Olney, Beatrice Rosenberg and *Edward S. Szukelewicz* for the United States. Reported below: 204 F. 2d 927.

No. 64, Misc. JONES *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. Reported below: 159 Tex. Cr. R. —, 261 S. W. 2d 324.

No. 77, Misc. HILL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Acting Solicitor General Stern, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 206 F. 2d 204.

No. 93, Misc. HARLAN *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 94, Misc. FLIPPIN *v.* RAGEN, WARDEN. Circuit Court of Lake County, Illinois. Certiorari denied.

No. 95, Misc. HOWARD *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. Reported below: 12 N. J. 444, 97 A. 2d 201.

No. 100, Misc. ST. JOHN *v.* GRABER, CHIEF JUSTICE, ET AL. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 101, Misc. TORRES ET AL. *v.* HOUSING AUTHORITY OF THE CITY OF LOS ANGELES ET AL. District Court of Appeal of California, Second Appellate District. Certiorari denied. *G. G. Baumen* for petitioners. *Joseph P. Loeb* and *Leonard S. Janofsky* for the Housing Authority of Los Angeles, respondent. Reported below: 116 Cal. App. 2d 813, 254 P. 2d 628.

No. 110, Misc. DANIELS ET AL. *v.* NORTH CAROLINA. Supreme Court of North Carolina. Certiorari denied. *O. John Rogge, Murray A. Gordon* and *Herman L. Taylor* for petitioners. *Harry McMullan*, Attorney General of North Carolina, and *Ralph Moody*, Assistant Attorney General, for respondent.

No. 113, Misc. TIMMONS *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Acting Solicitor General Stern, Assistant Attorney General Holland, Ellis N. Slack* and *Robert N. Anderson* for respondent. Reported below: 203 F. 2d 831.

No. 126, Misc. HAYMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Acting Solicitor General Stern, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 205 F. 2d 891.

No. 23, Misc. SHOTKIN *v.* ATCHISON, TOPEKA & SANTA FE R. CO. ET AL. Petition for writ of certiorari to the District Court in and for the City and County of Denver, Colorado, denied for the reason that the application therefor was not made within the time provided by law. *Walter F. Dodd* for petitioner. *Duke W. Dunbar*, Attorney General of Colorado, and *Frank A. Wachob*, Deputy Attorney General, for Black, District Judge, respondent.

No. 98, Misc. THOMAS *v.* UNITED STATES. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied for the reason that the application therefor was not made within the time provided by law.

No. 61, Misc. WELLS *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application. *Charles R. Garry* and *Philip C. Wilkins* for petitioner. Reported below: 201 F. 2d 503.

No. 67, Misc. BRAASCH ET AL. *v.* UTAH. Supreme Court of Utah. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion certiorari should be granted. Reported below: 123 Utah —, 253 P. 2d 378.

Rehearing Denied. (*See Nos. 540 and 573, October Term, 1952, ante, p. 853.*)

OCTOBER 26, 1953.

Per Curiam Decisions.

No. 383. BARLOW ET AL. *v.* A. P. SMITH MANUFACTURING CO. ET AL. Appeal from the Supreme Court of New Jersey. *Per Curiam:* The appeal is dismissed for the want of a substantial federal question. *Adolf A. Berle, Jr.* for appellants. *Theodore D. Parsons*, Attorney General of New Jersey, and *Thomas P. Cook*, Deputy Attorney General, for Parsons, appellee. Reported below: 13 N. J. 145, 98 A. 2d 581.

No. 412. ILLINOIS EX REL. SANKSTONE *v.* JARECKI, JUDGE OF THE COUNTY COURT OF COOK COUNTY, ET AL. Appeal from the United States District Court for the Northern District of Illinois. *Per Curiam:* The motions to dismiss are granted and the appeal is dismissed for the want of a substantial federal question. *Frank Michels* for appellant. *Latham Castle*, Attorney General of Illinois, and *William C. Wines*, Assistant Attorney General, for Carpentier et al.; and *Bernard J. Korzen, Gordon Nash, Vincent P. Flood* and *James C. Murray* for Holzman et al., appellees. Reported below: 116 F. Supp. 422.

Miscellaneous Orders.

No. —, Original. ALABAMA *v.* TEXAS ET AL. The motions of the defendants for time within which to file objections to the motion for leave to file the complaint are granted, and 40 days are allowed for that purpose. THE CHIEF JUSTICE took no part in the consideration or decision of these motions. *Si Garrett*, Attorney General of Alabama, *M. Roland Nachman, Jr.* and *Gordon Madison*, Assistant Attorneys General, and *Adrian S. Fisher* for complainant. *John Ben Shepperd*, Attorney General, and *William H. Holloway*, Assistant Attorney General, for the State of Texas; *Fred S. LeBlanc*, Attorney General, *John L. Madden*, Assistant Attorney General, and *Bailey Walsh*, Special Assistant Attorney General, for the State of Louisiana; *Richard W. Ervin*, Attorney General, *Howard S. Bailey* and *Fred M. Burns*, Assistant Attorneys General, and *John D. Moriarty*, Special Assistant Attorney General, for the State of Florida; and *Edmund G. Brown*, Attorney General, *William V. O'Connor*, Chief Deputy Attorney General, *Everett W. Mattoon*, Assistant Attorney General, and *George G. Grover*, Deputy Attorney General, for the State of California, defendants.

No. 11, Original. MISSISSIPPI *v.* LOUISIANA. It is ordered that D. K. McKamy, Esquire, of Birmingham, Alabama, be, and he is hereby, appointed special master in this cause, with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem it necessary to call for. The master is directed to find the facts specially and state separately his conclusions of law thereon, and to submit the same to this Court with all convenient speed, together with a draft of the decree recommended by him. The findings, conclusions, and recommended decree of the master shall be subject to consideration, revision, or ap-

proval by the Court. The master shall be allowed his actual expenses and a reasonable compensation for his services to be fixed hereafter by the Court. The allowances to him, the compensation paid to his stenographic and clerical assistants, and the cost of printing his report shall be charged against and be borne by the parties in such proportion as the Court hereafter may direct. If the appointment herein made of a master is not accepted, or if the place becomes vacant during the recess of the Court, THE CHIEF JUSTICE shall have authority to make a new designation which shall have the same effect as if originally made by the Court herein.

J. P. Coleman, Attorney General of Mississippi, and *G. H. Brandon* for complainant. *Fred S. LeBlanc*, Attorney General of Louisiana, *W. C. Perrault*, First Assistant Attorney General, *Carroll Buck*, Second Assistant Attorney General, and *Bailey Walsh* and *John L. Madden*, Assistant Attorneys General, for defendant.

No. 104. DABNEY, TRUSTEE, *v.* CHASE NATIONAL BANK; and

No. 105. CHASE NATIONAL BANK *v.* DABNEY, TRUSTEE. Petitions for writs of certiorari to the United States Court of Appeals for the Second Circuit dismissed per stipulation of counsel. *Lewis M. Dabney, Jr.* for Dabney, Trustee. *A. Donald MacKinnon* for the Chase National Bank. Reported below: 201 F. 2d 635.

Probable Jurisdiction Noted.

No. 274. COMMERCIAL PICTURES CORP. *v.* REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK. Appeal from the Court of Appeals of New York. Probable jurisdiction noted. *Florence Perlow Shientag* for appellant. *Nathaniel L. Goldstein*, Attorney General of New York, and *Charles A. Brind, Jr.* for appellees. Reported below: 305 N. Y. 336, 113 N. E. 2d 502.

Certiorari Granted.

No. 271. ADAMS *v.* MARYLAND. Court of Appeals of Maryland. Certiorari granted limited to question No. I presented by the petition for the writ [*i. e.*, whether 18 U. S. C. § 3486 "renders inadmissible testimony given by Adams before a Senate Committee in a criminal case in the Maryland Courts and in turn avoids a conviction which has to rely upon the testimony thus admitted?"]. *James A. Cobb* and *George E. C. Hayes* for petitioner. *Edward D. E. Rollins*, Attorney General of Maryland, *J. Edgar Harvey*, Deputy Attorney General, and *W. Giles Parker*, Assistant Attorney General, for respondent. Reported below: 202 Md. 455, 97 A. 2d 281.

No. 128, Misc. NORTH *v.* FLORIDA. Supreme Court of Florida. Certiorari granted. *C. Jay Hardee, Claude Pepper* and *John R. Parkhill* for petitioner. Reported below: 65 So. 2d 77.

Certiorari Denied.

No. 167. STUYVESANT TOWN CORP. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Eugene Meacham* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Holland, Ellis N. Slack, Hilbert P. Zarky* and *Harry Baum* for the United States. Reported below: 124 Ct. Cl. 686, 111 F. Supp. 243.

No. 260. KITZEN *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se*. *Frank S. Hogan* and *Charles W. Manning* for respondent. Reported below: 305 N. Y. 756, 113 N. E. 2d 151.

No. 266. FALSONE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *George W. Ericksen, Howard P. Macfarlane* and *Hugh C. Macfarlane* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Holland, Ellis N. Slack, Hilbert P. Zarky* and *Louise Foster* for the United States. Reported below: 205 F. 2d 734.

No. 263. MARONEY, SUCCESSOR TO CLAUDY, WARDEN, *v.* UNITED STATES EX REL. DARCY. C. A. 3d Cir. Certiorari denied. *Robert E. Woodside*, Attorney General of Pennsylvania, *Randolph C. Ryder*, Deputy Attorney General, and *Willard S. Curtin* for petitioner. *Charles J. Margiotti* for respondent. Reported below: 203 F. 2d 407.

No. 269. VIRGINIA METAL PRODUCTS CORP. *v.* TAYLOR. C. A. 4th Cir. Certiorari denied. *Leo C. Fennelly* for petitioner. *Donald R. Richberg* and *James H. Michael, Jr.* for respondent. Reported below: 204 F. 2d 457.

No. 270. ROUSE *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. *R. Palmer Ingram* for petitioner. *Edward D. E. Rollins*, Attorney General of Maryland, *J. Edgar Harvey*, Deputy Attorney General, and *W. Giles Parker*, Assistant Attorney General, for respondent. Reported below: 202 Md. 481, 97 A. 2d 285.

No. 275. PUBLIC COMMON STOCKHOLDERS PROTECTIVE COMMITTEE *v.* ARKANSAS NATURAL GAS CORP. ET AL. C. A. 3d Cir. Certiorari denied. *Clarence Fried* for petitioner. *Acting Solicitor General Stern, Roger S. Foster, Myron S. Isaacs* and *Aaron Levy* for the Securities and Exchange Commission; *Robert Burns* and *Joseph L. Weiner* for the Cities Service Company; and *Percival E. Jackson* for the Arkansas Natural Gas Corporation Class A Common Stock Committee, respondents. Reported below: 204 F. 2d 797.

No. 276. CLARK *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *William H. Collins* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Olney, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 93 U. S. App. D. C. —, 208 F. 2d 840.

No. 277. GENERAL ARTISTS CORP. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Morton Miller* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Holland, Ellis N. Slack, A. F. Prescott* and *Morton K. Rothschild* for respondent. Reported below: 205 F. 2d 360.

No. 278. HIRSHHORN *v.* MINE SAFETY APPLIANCES CO. ET AL. C. A. 3d Cir. Certiorari denied. *John B. Doyle* for petitioner. *Charles E. Kenworthey* and *Paul E. Hutchinson* for respondents. Reported below: 203 F. 2d 279.

No. 282. LONDONO *v.* CITIZENS NATIONAL TRUST & SAVINGS BANK ET AL. C. A. 9th Cir. Certiorari denied. *Robert H. Dunlap* for petitioner. *T. B. Cosgrove, John N. Cramer* and *Leonard A. Diether* for the Citizens National Trust & Savings Bank; and *O. B. Thorgrimson* and *Joseph H. Dasteel* for Dulien Steel Products, Inc. et al., respondents. Reported below: 204 F. 2d 377.

No. 284. SEACOAST GAS CO., INC. ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Charles L. Gowen* for petitioners. *Acting Solicitor General Stern, Assistant Attorney General Burger, Paul A. Sweeney* and *Russell Chapin* for the United States. Reported below: 204 F. 2d 709.

No. 285. FEDERAL INSURANCE CO. ET AL. *v.* ISBRANDTSEN CO., INC. C. A. 2d Cir. Certiorari denied. *Henry N. Longley* and *F. Herbert Prem* for petitioners. *James S. Hemingway* for respondent. Reported below: 205 F. 2d 679.

No. 286. NAREHOOD ET AL. *v.* PEARSON ET AL., COUNTY COMMISSIONERS OF CLEARFIELD COUNTY. Supreme Court of Pennsylvania, Eastern District. Certiorari denied.

William D. Donnelly for petitioners. *Frank G. Smith* and *Robert V. Maine* for respondents. Reported below: 374 Pa. 299, 96 A. 2d 895.

No. 288. JOHNSON & JOHNSON *v.* Q-TIPS, INC. C. A. 3d Cir. Certiorari denied. *Kenneth Perry* and *Chester T. Lane* for petitioner. *W. Brown Morton* for respondent. Reported below: 206 F. 2d 144.

No. 290. NERI, DOING BUSINESS AS IMPRESA DI SALVATAGGI FRATELLI NERI (NERI BROTHERS SALVAGE ENTERPRISE) *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Paul C. Matthews* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Burger, Samuel D. Slade* and *Herman Marcuse* for the United States. Reported below: 204 F. 2d 867.

No. 292. FERGUSON ET AL. *v.* PHILADELPHIA TRANSPORTATION CO. C. A. 3d Cir. Certiorari denied. *Ernest Ray White* for petitioners. *Francis H. Scheetz* for respondent. Reported below: 205 F. 2d 520.

No. 293. COOPER *v.* SINCLAIR, CUSTODIAN OF LAKELAND CITY JAIL. Supreme Court of Florida. Certiorari denied. *Sam E. Murrell* for petitioner. *James Hardin Peterson* for respondent. Reported below: 66 So. 2d 702.

No. 236. WHITTINGTON *v.* JOHNSTON ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion the petition should be granted. *Walter J. Knabe* for petitioner. *Ewell C. Orme* and *Jesse M. Williams, Jr.* for respondents. Reported below: 201 F. 2d 810.

No. 265. WETHERBEE, ADMINISTRATRIX, *v.* ELGIN, JOLIET & EASTERN RAILWAY CO. C. A. 7th Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE

DOUGLAS are of the opinion the petition should be granted. *Lloyd T. Bailey* for petitioner. *Harlan L. Hackbert* for respondent. Reported below: 204 F. 2d 755.

No. 65, Misc. HOLLAND *v.* SAFEWAY STORES, INC. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit denied for the reason that application therefor was not made within the time provided by law.

No. 82, Misc. MCCULLOUGH *v.* UNITED STATES FIDELITY & GUARANTY CO. C. A. 5th Cir. Certiorari denied. *Julius T. Long* for petitioner. Reported below: 202 F. 2d 269.

NOVEMBER 9, 1953.

Per Curiam Decisions.

No. 323. FRANKLIN, REGIONAL COUNSEL, WAGE STABILIZATION BOARD, ET AL. *v.* JONCO AIRCRAFT CORP. Appeal from the United States District Court for the Northern District of Texas. *Per Curiam:* The appellee having failed to exhaust its administrative remedy, the judgment is reversed. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41; *Public Service Commission of Utah* v. *Wycoff Company, Inc.*, 344 U. S. 237, 246. *Acting Solicitor General Stern* for appellants. *Jerry N. Griffin* and *John K. Pickens* for appellee. Reported below: 114 F. Supp. 392.

No. 308. NEW JERSEY & NEW YORK RAILROAD CO. *v.* BOARD OF PUBLIC UTILITY COMMISSIONERS OF NEW JERSEY ET AL. Appeal from the Supreme Court of New Jersey. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *Richard Swan Buell* and *Justin W. Seymour* for appellant. *Theodore D. Parsons*, Attorney General of New Jersey, *John R. Sailer*, Deputy Attorney

General, and *Frank H. Sommer* for the Board of Public Utility Commissioners; and *Sam A. Colarusso* for the Brotherhood of Railroad Trainmen, appellees. Reported below: 12 N. J. 281, 96 A. 2d 526.

No. 343. AIKEN *v.* RICHARDSON. Appeal from the Supreme Court of Georgia. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *G. Seals Aiken, pro se. Ralph Williams* for appellee. Reported below: 209 Ga. 837, 76 S. E. 2d 393.

No. 309. TWEEL *v.* WEST VIRGINIA RACING COMMISSION ET AL. Appeal from the Supreme Court of Appeals of West Virginia. *Per Curiam:* The appeal is dismissed for the want of a substantial federal question. *Seldon S. McNeer* for appellant. Reported below: 138 W. Va. —, 76 S. E. 2d 874.

No. 320. SACKETT *v.* LOUISIANA. Appeal from the Criminal District Court for the Parish of Orleans, Louisiana, Appellate Division. *Per Curiam:* The appeal is dismissed for the want of a substantial federal question. *Maurice R. Woulfe* for appellant.

No. 315. WESTERN UNION TELEGRAPH CO. ET AL. *v.* NEW JERSEY. Appeal from the Supreme Court of New Jersey. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. MR. JUSTICE BLACK and MR. JUSTICE REED are of the opinion that probable jurisdiction should be noted. *John H. Waters* and *William G. H. Acheson* for appellants. *Theodore D. Parsons*, Attorney General of New Jersey, and *Joseph A. Murphy*, Assistant Attorney General, for appellee. Reported below: 12 N. J. 468, 97 A. 2d 480.

No. 325. COLUMBIA PROPERTIES, INC. *v.* STATE BOARD OF TAX COMMISSIONERS OF INDIANA ET AL. Appeal from the Supreme Court of Indiana. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of jurisdiction. 28 U. S. C. § 1257 (2). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari as required by 28 U. S. C. § 2103, certiorari is denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that probable jurisdiction should be noted. *Cornelius W. Grafton* for appellant. *Edwin K. Steers*, Attorney General of Indiana, *Robert Hollowell*, Chief Counsel, and *George B. Jeffrey*, Deputy Attorney General, for the State Board of Tax Commissioners; and *William C. Welborn* and *Milford M. Miller* for the County Board of Review of Vanderburgh County et al., appellees. Reported below: 232 Ind. 262, 111 N. E. 2d 891.

Miscellaneous Order.

No. 183, Misc. HIGGINS *v.* BINNS, U. S. ATTORNEY. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit dismissed on motion of petitioner. *Morris Lavine* for petitioner. Reported below: 205 F. 2d 653.

Probable Jurisdiction Noted.

No. 335. GENERAL ELECTRIC CO. ET AL. *v.* WASHINGTON. Appeal from the Supreme Court of Washington. Probable jurisdiction noted. *Acting Solicitor General Stern* for the United States, appellant. Reported below: 42 Wash. 2d 411, 256 P. 2d 265.

Certiorari Granted.

No. 300. BROWNELL, ATTORNEY GENERAL, *v.* RUBINSTEIN. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Acting Solici-*

tor General Stern for petitioner. *Edward J. Ennis* and *Jack Wasserman* for respondent. Reported below: 92 U. S. App. D. C. 328, 206 F. 2d 449.

No. 318. GORDON ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari granted. *John S. Boyden* and *Allen H. Tibbals* for petitioners. *Acting Solicitor General Stern* for the United States.

No. 347. GIALLO ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari granted. *Henry K. Chapman* for petitioners. *Acting Solicitor General Stern, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 206 F. 2d 207.

Certiorari Denied. (*See also No. 325, supra.*)

No. 189. BATTIATO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *George F. Callaghan* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Olney, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 204 F. 2d 717.

No. 267. GLENN ET AL. *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. *Loring B. Moore* and *William R. Ming, Jr.* for petitioners. Reported below: 415 Ill. 47, 112 N. E. 2d 133.

No. 295. ESTATE OF DWIGHT ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *John C. Crawley* for petitioners. *Acting Solicitor General Stern, Assistant Attorney General Holland, Ellis N. Slack* and *L. W. Post* for respondent. Reported below: 205 F. 2d 298.

No. 279. McCoy *v.* Siler et al., trading as Siler Brothers, et al. C. A. 3d Cir. Certiorari denied. *Ernest Ray White* for petitioner. Reported below: 205 F. 2d 498.

No. 294. Howarth *v.* Howarth. District Court of Appeal of California, Second Appellate District. Certiorari denied. *Lawrence M. Cahill* and *Edith C. Cahill* for petitioner. Reported below: 115 Cal. App. 2d 769, 252 P. 2d 743.

No. 296. Eureka Williams Corp. *v.* McCorquodale. United States Court of Customs and Patent Appeals. Certiorari denied. *Edwin J. Balluff* for petitioner. Reported below: 40 C. C. P. A. (Pat.) 1028, 205 F. 2d 155.

No. 297. Watson *v.* Sinclair Refining Co. Supreme Court of Florida. Certiorari denied. *Erwin Sibley* for petitioner. *Mitchell D. Price* for respondent. Reported below: 65 So. 2d 732.

No. 298. Forbes *v.* Commissioner of Internal Revenue. C. A. 2d Cir. Certiorari denied. *Watson Washburn* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Holland, Ellis N. Slack, Lee A. Jackson* and *Robert B. Ross* for respondent. Reported below: 204 F. 2d 777.

No. 303. Fisher *v.* United States. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Myron G. Ehrlich* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Olney, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 92 U. S. App. D. C. 247, 205 F. 2d 702.

No. 301. MAURICE A. GARBELL, INC. ET AL. *v.* CONSOLIDATED VULTEE AIRCRAFT CORP. ET AL. C. A. 9th Cir. Certiorari denied. *Theodore H. Roche* and *Theo. J. Roche* for petitioners. *Ford W. Harris, Jr., Robert B. Watts* and *Fred Gerlach* for respondents. Reported below: 204 F. 2d 946.

No. 302. KUGLER *v.* PHILADELPHIA FIRE & MARINE INSURANCE CO. C. A. 5th Cir. Certiorari denied. *W. Frank Gladney* for petitioner. Reported below: 204 F. 2d 297.

No. 305. CHASTAIN *v.* MCKINNEY ET AL. C. A. 6th Cir. Certiorari denied. *Harry J. Lippman* for petitioner. *Herbert H. Monsky* for Cahill et al., and *Leo T. Wolford* for the Louisville Title Insurance Company et al., respondents. Reported below: 203 F. 2d 712.

No. 306. ESTATE OF CRELLIN ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. *Charles A. Beardsley* for petitioners. *Acting Solicitor General Stern, Assistant Attorney General Holland, Ellis N. Slack* and *I. Henry Kutz* for respondent. Reported below: 203 F. 2d 812.

No. 310. MARINE WELDING, SCALING & SALES CO., INC. ET AL. *v.* ELLIS ET AL. C. A. 5th Cir. Certiorari denied. *Alfred C. Kammer* for petitioners. *Leonard H. Rosenson* for respondents. Reported below: 204 F. 2d 173.

No. 312. DEMOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Guy P. Allison* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Olney, Beatrice Rosenberg* and *Carl H. Imlay* for the United States. Reported below: 205 F. 2d 596.

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No. 314. WHITWORTH ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. *Spaulding Glass* for petitioners. *Acting Solicitor General Stern, Assistant Attorney General Holland, Ellis N. Slack* and *Hilbert P. Zarky* for respondent. Reported below: 204 F. 2d 779.

No. 316. CIFOLO ET AL. *v.* GENERAL ELECTRIC CO. Court of Appeals of New York. Certiorari denied. *David Scribner, Arthur Kinoy* and *Frank J. Donner* for petitioners. *Phil E. Gilbert, Jr.* and *Harold A. Segall* for respondent. Reported below: 305 N. Y. 209, 112 N. E. 2d 197.

No. 317. GOEPP, ADMINISTRATRIX, *v.* AMERICAN OVERSEAS AIRLINES, INC. Court of Appeals of New York. Certiorari denied. *H. G. Pickering* for petitioner. *William J. Junkerman* for respondent. Reported below: 305 N. Y. 830, 114 N. E. 2d 37.

No. 321. BRADLEY MINING CO. *v.* BOICE. C. A. 9th Cir. Certiorari denied. *John Parks Davis, Oscar W. Worthwine* and *Arthur B. Dunne* for petitioner. *William H. Langroise* for respondent. Reported below: 205 F. 2d 937.

No. 324. J. & L. SNOUFFER, INC. *v.* ADAMS ET AL. C. A. 6th Cir. Certiorari denied. *Matthew L. Bigger* for petitioner. *William S. Evatt* and *Robert L. Barton* for respondents. Reported below: 203 F. 2d 566.

No. 327. JOHNSON *v.* JOHNSON. Court of Appeals of Maryland. Certiorari denied. *Karl F. Steinmann* for petitioner. *Wilfred T. McQuaid* for respondent. Reported below: 202 Md. 547, 97 A. 2d 330.

No. 328. PENNSYLVANIA *v.* MELLON NATIONAL BANK & TRUST CO., SUCCESSOR TO MELLON NATIONAL BANK. Supreme Court of Pennsylvania, Middle District. Certiorari denied. *Robert E. Woodside*, then Attorney General of Pennsylvania, *Frank F. Truscott*, Attorney General, and *H. F. Stambaugh* for petitioner. *Charles E. Kenworthey* and *Roy J. Keefer* for respondent. Reported below: 374 Pa. 519, 98 A. 2d 168.

No. 333. HACK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Albert Ward* and *Palmer K. Ward* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 205 F. 2d 723.

No. 334. NINA DYE WORKS CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. *Dan Gordon Judge* for petitioner. *Acting Solicitor General Stern, George J. Bott, David P. Findling* and *Dominick L. Manoli* for respondent. Reported below: 203 F. 2d 849.

No. 337. UNITED STATES *v.* MORRELL. C. A. 4th Cir. Certiorari denied. *Acting Solicitor General Stern* for the United States. *Herbert E. Witz* for respondent. Reported below: 204 F. 2d 490.

No. 338. HIGHTOWER *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. *Julius Lucius Echeles* for petitioner. Reported below: 414 Ill. 537, 112 N. E. 2d 126.

No. 339. AVONDALE MARINE WAYS, INC. *v.* WILSON ET AL. C. A. 5th Cir. Certiorari denied. *Harry McCall* for petitioner. *Samuel J. Tennant, Jr.* for respondents. Reported below: 205 F. 2d 518.

No. 336. UNITED STATES *v.* LANDSMAN. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Acting Solicitor General Stern* for the United States. *Paul R. Harmel* for respondent. Reported below: 92 U. S. App. D. C. 276, 205 F. 2d 18.

No. 340. LEONARD ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. *John M. Hudson* for petitioners. *Acting Solicitor General Stern, Assistant Attorney General Holland* and *Ellis N. Slack* for respondent. Reported below: 206 F. 2d 227.

No. 341. WHITE CAP CO. *v.* OWENS-ILLINOIS GLASS CO. C. A. 6th Cir. Certiorari denied. *William H. Davis, George E. Faithfull, Raymond L. Greist* and *Paul Plunkett* for petitioner. *George I. Haight, Fred E. Fuller* and *Frank A. Harrington* for respondent. Reported below: 203 F. 2d 694.

No. 345. BOYD, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE, ET AL. *v.* MANGAOANG. C. A. 9th Cir. Certiorari denied. *Acting Solicitor General Stern* for petitioners. *Joseph Forer* for respondent. Reported below: 205 F. 2d 553.

No. 346. EVARTS *v.* ELOY GIN CORP. ET AL. C. A. 9th Cir. Certiorari denied. *Edward H. Foley* for petitioner. Reported below: 204 F. 2d 712.

No. 348. GEORGE KEMP REAL ESTATE CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Alexander S. Andrews* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Holland, Ellis N. Slack* and *Harry Marselli* for respondent. Reported below: 205 F. 2d 236.

No. 350. LAWRENCE-CEDARHURST BANK *v.* DAVIS, TRUSTEE. C. A. 2d Cir. Certiorari denied. *Edward S. Bentley* for petitioner. *Max Schwartz* for respondent. Reported below: 204 F. 2d 431.

No. 264. ADDISON ET AL. *v.* HURON STEVEDORING CORP. ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion certiorari should be granted. *Max R. Simon, Monroe Goldwater* and *James L. Goldwater* for petitioners. *Acting Solicitor General Stern, Assistant Attorney General Burger, Samuel D. Slade* and *Marvin C. Taylor* for respondents. Reported below: 204 F. 2d 88.

No. 313. DRUMMOND *v.* VIRGINIA. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 322. IOWA STATE TRAVELING MEN'S ASSOCIATION *v.* PARMALEE. C. A. 5th Cir. Certiorari denied. MR. JUSTICE REED and MR. JUSTICE JACKSON are of the opinion certiorari should be granted. *Robert H. Anderson* and *D. P. S. Paul* for petitioner. Reported below: 206 F. 2d 518.

No. 326. FLETCHER *v.* NOSTADT ET AL. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Charles E. Morganston* for Nostadt, respondent. Reported below: 205 F. 2d 896.

No. 59, Misc. BEELER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Acting Solicitor General Stern, Assistant Attorney General Olney, Beatrice Rosenberg* and *John R. Wilkins* for the United States. Reported below: 205 F. 2d 454.

No. 73, Misc. CRUTCHERS *v.* SKEEN, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari

denied. Petitioner *pro se*. *John G. Fox*, Attorney General of West Virginia, and *T. D. Kauffelt*, Assistant Attorney General, for respondent.

No. 92, Misc. BILOCHE *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 414 Ill. 504, 112 N. E. 2d 162.

No. 99, Misc. SUSANEC *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 103, Misc. STRAHL *v.* PEPERSACK, WARDEN. Court of Appeals of Maryland. Certiorari denied. Reported below: 202 Md. 655, 97 A. 2d 134.

No. 104, Misc. RIZZI *v.* NEW YORK. Appellate Division of the Supreme Court of New York, First Judicial Department. Certiorari denied. Reported below: 282 App. Div. 666, 122 N. Y. S. 2d 795.

No. 106, Misc. BARRETT *v.* KANSAS ET AL. Supreme Court of Kansas. Certiorari denied. Reported below: 174 Kan. 754, 258 P. 2d 351.

No. 111, Misc. GILBERT *v.* ILLINOIS. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 118, Misc. WELLS *v.* ILLINOIS PAROLE AND PARDON BOARD ET AL. Supreme Court of Illinois. Certiorari denied.

No. 119, Misc. BRISTOL *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 116, Misc. COLBERT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 202 F. 2d 793.

No. 120, Misc. ZUBR *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 121, Misc. BORTNYAK *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 122, Misc. EMMETT *v.* CRANOR, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 123, Misc. PARDEE *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 129, Misc. WARD *v.* WATERS, WARDEN. Criminal Court of Appeals of Oklahoma. Certiorari denied. Reported below: 97 Okla. Cr. —, 257 P. 2d 1099.

No. 131, Misc. TATE *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 133, Misc. BIRD *v.* NEW YORK. Appellate Division of the Supreme Court of New York, First Judicial Department. Certiorari denied. Reported below: 282 App. Div. 651, 122 N. Y. S. 2d 791.

No. 134, Misc. TRICARICO *v.* WALKER, WARDEN. Superior Court for Hartford County, Connecticut. Certiorari denied.

No. 137, Misc. PLACHNO *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

Rehearing Denied.

No. 308, October Term, 1952. DALEHITE ET AL. *v.* UNITED STATES, 346 U. S. 15. Motion for leave to file petition for rehearing denied. THE CHIEF JUSTICE, MR. JUSTICE DOUGLAS and MR. JUSTICE CLARK took no part in the consideration or decision of this motion.

No. 139. BERTEL ET AL. *v.* PANAMA TRANSPORT CO. ET AL., *ante*, p. 834. Motion for leave to file petition for rehearing denied. THE CHIEF JUSTICE took no part in the consideration or decision of this motion.

No. 74. FEITLER ET AL., TRADING AS GARDNER & CO., *v.* FEDERAL TRADE COMMISSION, *ante*, p. 814;

No. 122. WEISBROD *v.* UNITED STATES, *ante*, p. 819;

No. 131. COLLINS *v.* CALIFORNIA, *ante*, p. 803;

No. 135. GEHMAN *v.* SMITH, COLLECTOR OF INTERNAL REVENUE, *ante*, p. 820;

No. 146. FINNEGAN *v.* UNITED STATES, *ante*, p. 821;

No. 151. SIMPSON ET AL. *v.* CITY OF LOS ANGELES ET AL., *ante*, p. 802;

No. 164. GOLDBAUM ET AL. *v.* UNITED STATES, *ante*, p. 831;

No. 214. DAUGHERTY *v.* CALIFORNIA, *ante*, p. 827;

No. 268. BROWN *v.* ILLINOIS, *ante*, p. 804;

No. 45, Misc. EX PARTE COOPER, *ante*, p. 806;

No. 86, Misc. HENDRICKSON *v.* BALDI, SUPERINTENDENT, PHILADELPHIA COUNTY PRISON, PENNSYLVANIA, *ante*, p. 807; and

No. 113, Misc. TIMMONS *v.* COMMISSIONER OF INTERNAL REVENUE, *ante*, p. 860. Petitions for rehearing denied. THE CHIEF JUSTICE took no part in the consideration or decision of these applications.

No. 388, Misc., October Term, 1952. HOURIHAN *v.* NATIONAL LABOR RELATIONS BOARD ET AL., 345 U. S. 930.

Third petition for rehearing denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application.

No. 511, Misc., October Term, 1952. LEE *v.* TENNESSEE, 345 U. S. 1003. Second petition for rehearing denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application.

NOVEMBER 16, 1953.

Per Curiam Decision.

No. 342. NATIONAL UNION OF MARINE COOKS AND STEWARDS ASSOCIATION *v.* ARNOLD ET AL. Appeal from the Supreme Court of Washington. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. The motion for damages and double costs is denied. MR. JUSTICE BLACK is of the opinion that probable jurisdiction should be noted. *Norman Leonard* for appellant. *Samuel D. Bassett* for appellees. Reported below: 42 Wash. 2d 648, 257 P. 2d 629.

Miscellaneous Orders.

No. —. TUREAUD *v.* BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE ET AL. This is an application by the relator for a stay of the judgment of the United States Court of Appeals for the Fifth Circuit which is to be brought here for review in a petition for certiorari. The application is granted and the judgment of the Court of Appeals is stayed until the final disposition here of the petition for certiorari to be filed. MR. JUSTICE REED dissents on the ground that the status of the applicant at the institution of the litigation should be preserved pending final judgment. *Robert L. Carter* for petitioner.

Fred S. LeBlanc, Attorney General of Louisiana, *W. C. Perrault*, First Assistant Attorney General, *J. Clyde Pearce*, Assistant Attorney General, *Fred A. Blanche, Sr., Arthur O'Quin, Leander H. Perez, C. V. Porter, Victor A. Sachse, Grove Stafford, Oliver Stockwell, Wood H. Thompson, John H. Tucker, Jr., W. Scott Wilkinson* and *Laurance W. Brooks* for respondents.

No. 228. MAZER ET AL., DOING BUSINESS AS JUNE LAMP MANUFACTURING CO., *v.* STEIN ET AL., DOING BUSINESS AS REGLOR OF CALIFORNIA. Certiorari, *ante*, p. 811, to the United States Court of Appeals for the Fourth Circuit. The application of the Solicitor General for leave to appear and present oral argument on behalf of the Register of Copyrights, as *amicus curiae*, is granted.

No. 338. HIGHTOWER *v.* ILLINOIS. The application of petitioner to withhold the order denying certiorari, *ante*, p. 875, pending filing of petition for rehearing is denied.

No. 407. GALVAN *v.* PRESS, OFFICER IN CHARGE, IMMIGRATION AND NATURALIZATION SERVICE. Certiorari, *ante*, p. 812, to the United States Court of Appeals for the Ninth Circuit. The application for bail is granted and it is ordered that petitioner be admitted to bail upon the posting of a good and sufficient surety bond in the amount of two thousand ($2,000) dollars. The bond is to be approved by the United States District Court for the Southern District of California or a judge thereof and when approved to be filed with the clerk of that court. The application for leave to proceed on the typewritten record is granted.

No. 5, Original, October Term, 1950. NEW JERSEY *v.* NEW YORK ET AL., *ante*, p. 853. The applications of New

Jersey and Pennsylvania for an extension of time within which to answer the amended petition of the City of New York are granted and the time is extended to and including December 14, next. *Theodore D. Parsons*, Attorney General, and *Robert Peacock*, Deputy Attorney General, for the State of New Jersey. *Frank F. Truscott*, Attorney General, and *Wm. A. Schnader* for the State of Pennsylvania.

No. 272. BOOK-OF-THE-MONTH CLUB, INC. ET AL. *v.* FEDERAL TRADE COMMISSION. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit dismissed on motion of petitioners. *George M. Wolfson* for petitioners. Reported below: 202 F. 2d 486.

No. 114, Misc. HENDERSON *v.* BANNAN, WARDEN. Recorder's Court of the City of Detroit, Michigan. Certiorari denied. Motion for leave to file petition for writ of habeas corpus also denied.

No. 158, Misc. TAYLOR *v.* SWOPE, WARDEN. C. A. 9th Cir. Certiorari denied. Motion for leave to file petition for writ of habeas corpus also denied.

No. 138, Misc. TAYLOR *v.* UNITED STATES BOARD OF PAROLE. Motion for leave to file petition for writ of mandamus denied.

No. 151, Misc. LEVY *v.* CALIFORNIA. Application denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application.

No. 152, Misc. TAYLOR *v.* UNITED STATES BOARD OF PAROLE. Motion for leave to file petition for writ of quo warranto denied.

Certiorari Granted.

No. 304. REMMER *v.* UNITED STATES. C. A. 9th Cir. Certiorari granted. THE CHIEF JUSTICE took no part in the consideration or decision of this application. *J. Louis Monarch* and *Spurgeon Avakian* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Holland, Ellis N. Slack* and *Joseph M. Howard* for the United States. Reported below: 205 F. 2d 277.

No. 331. UNITED STATES *v.* GUY W. CAPPS, INC. C. A. 4th Cir. Certiorari granted. *Acting Solicitor General Stern* for the United States. *W. R. Ashburn* for respondent. Reported below: 204 F. 2d 655.

No. 366. UNITED STATES EX REL. ACCARDI *v.* SHAUGHNESSY, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE. C. A. 2d Cir. Certiorari granted. *Jack Wasserman* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Olney* and *Beatrice Rosenberg* for respondent. Reported below: 206 F. 2d 897.

No. 352. THOMPSON *v.* LAWSON, DEPUTY COMMISSIONER OF THE UNITED STATES BUREAU OF EMPLOYEES COMPENSATION, ET AL. C. A. 5th Cir. Certiorari granted. *Thomas M. Cooley, II*, for petitioner. *Acting Solicitor General Stern* filed a memorandum stating that the respondent Deputy Commissioner does not oppose the granting of the petition. Reported below: 205 F. 2d 527.

Certiorari Denied. (See also Misc. Nos. 114 and 168, supra.)

No. 180. ELGES *v.* NEVADA. Supreme Court of Nevada. Certiorari denied. *Milton W. King* for petitioner. *W. T. Mathews*, Attorney General of Nevada, *Geo. P. Annand, William N. Dunseath, John W. Barrett*, Deputy

Attorneys General, *Alan Bible* and *Jack Streeter* for respondent. Reported below: 69 Nev. 330, 251 P. 2d 590.

No. 311. UNITED STATES *v.* FRYER. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Acting Solicitor General Stern* for the United States. *James J. Laughlin* for respondent. Reported below: 93 U. S. App. D. C. —, 207 F. 2d 134.

No. 332. BENZ ET AL. *v.* COMPANIA NAVIERA HIDALGO, S. A. C. A. 9th Cir. Certiorari denied. *Kneland C. Tanner* for petitioners. Reported below: 205 F. 2d 944.

No. 351. SCHULZ ET AL. *v.* FLORA. Supreme Court of Pennsylvania, Eastern District. Certiorari denied. *Robert Ruppin* for petitioners. Reported below: 374 Pa. 459, 98 A. 2d 176.

No. 353. BOYLE *v.* LARUE, TREASURER OF TRUMBULL COUNTY, ET AL. Supreme Court of Ohio. Certiorari denied. *James J. Boyle, pro se. Wendell E. Cable* for the Village of Hubbard, respondent. Reported below: 159 Ohio St. 573, 112 N. E. 2d 664.

No. 354. AEBY ET UX. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *James H. Martin* for petitioners. *Acting Solicitor General Stern, Assistant Attorney General Olney, Beatrice Rosenberg* and *Carl H. Imlay* for the United States. Reported below: 206 F. 2d 296.

No. 355. FOLLETT *v.* VORIS, DEPUTY COMMISSIONER, BUREAU OF EMPLOYEES COMPENSATION, ET AL. C. A. 5th Cir. Certiorari denied. *Arthur J. Mandell* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Burger* and *Samuel D. Slade* for the Deputy Commissioner; and *John R. Brown* and *E. D.*

Vickery for the Texas Employers' Insurance Association, respondents. Reported below: 205 F. 2d 542.

No. 358. WHELAN ET AL. *v.* RILEY, ASSESSOR-COLLECTOR OF TAXES. C. A. 5th Cir. Certiorari denied. *James D. Smullen* for petitioners. Reported below: 205 F. 2d 513.

No. 359. KELLY *v.* GENERAL ELECTRIC CO. C. A. 3d Cir. Certiorari denied. *Ernest Ray White* for petitioner. *Henry S. Drinker, Charles J. Biddle* and *Francis Hopkinson* for respondent. Reported below: 204 F. 2d 692.

No. 360. FONTANA *v.* HURON STEVEDORING CORP. C. A. 2d Cir. Certiorari denied. *Nathan Baker* for petitioner. *Thomas Coyne* and *Vernon S. Jones* for respondent. Reported below: 205 F. 2d 151.

No. 361. GUIBERSON CORPORATION *v.* GARRETT OIL TOOLS, INC. C. A. 5th Cir. Certiorari denied. *S. Austin Wier* for petitioner. *James B. Simms* for respondent. Reported below: 205 F. 2d 660.

No. 362. BIGELOW ET AL. *v.* RKO RADIO PICTURES, INC. ET AL. C. A. 7th Cir. Certiorari denied. *Thomas C. McConnell* for petitioners. *George L. Siegel* and *Edward C. Raftery* for the Winston Theatre Corporation, respondent. Reported below: 205 F. 2d 231.

No. 363. STRONGHOLD SCREW PRODUCTS, INC. *v.* INDEPENDENT NAIL & PACKING CO., INC. C. A. 7th Cir. Certiorari denied. *Casper W. Ooms* for petitioner. *Thomas F. McWilliams* and *Herbert A. Baker* for respondent. Reported below: 205 F. 2d 921.

No. 365. HILLSBORO NATIONAL BANK *v.* BUSCHER, TRUSTEE IN BANKRUPTCY. C. A. 7th Cir. Certiorari

denied. *A. L. Wheeler* for petitioner. *Josiah T. Bullington* for respondent. Reported below: 204 F. 2d 520.

No. 367. AMERICAN AUTOMOBILE ASSOCIATION ET AL. *v.* SPIEGEL, DOING BUSINESS AS LAKE SERVICE STATION. C. A. 2d Cir. Certiorari denied. *Leo T. Kissam* for petitioners. *Samuel Rubinton* for respondent. Reported below: 205 F. 2d 771.

No. 368. LALLAK *v.* FARMERS' MUTUAL INSURANCE CO. ET AL. Supreme Court of Kansas. Certiorari denied. *A. B. Mitchell* for petitioner. *Walter T. Griffin* for the Farmers' Mutual Insurance Company, respondent. Reported below: 174 Kan. 720, 257 P. 2d 933.

No. 369. KEYSTONE METAL CO. *v.* CITY OF PITTSBURGH ET AL. Supreme Court of Pennsylvania, Western District. Certiorari denied. *Earl F. Reed* for petitioner. *Anne X. Alpern* for respondents. Reported below: 374 Pa. 323, 97 A. 2d 797.

No. 370. REED & PRINCE MANUFACTURING CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 1st Cir. Certiorari denied. *Gerard D. Reilly* for petitioner. *Acting Solicitor General Stern, George J. Bott, David P. Findling, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 205 F. 2d 131.

No. 291. SERIO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *G. Wray Gill* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Olney, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 203 F. 2d 576.

No. 299. KENTUCKY RIVER MILLS *v.* JACKSON. C. A. 6th Cir. Certiorari denied. MR. JUSTICE BLACK is of

the opinion certiorari should be granted. *Leslie W. Morris* for petitioner. *James Park* for respondent. Reported below: 206 F. 2d 111.

No. 371. Los Angeles County Pioneer Society *v.* Historical Society of Southern California et al. Supreme Court of California. Certiorari denied. *Morris Lavine* for petitioner. *Edmund G. Brown*, Attorney General, *Frank J. Mackin*, Assistant Attorney General, and *Edward Sumner*, Deputy Attorney General, for the State of California; and *Oscar Lawler* for the Historical Society of Southern California, respondents. Reported below: 40 Cal. 2d 852, 257 P. 2d 1.

No. 376. Paul *v.* United States et al. C. A. 3d Cir. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. *Abraham E. Freedman, Charles Lakatos* and *Joseph Weiner* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Burger* and *Samuel D. Slade* for respondents. Reported below: 205 F. 2d 38.

No. 8, Misc. Bigness *v.* Nevada. Supreme Court of Nevada. Certiorari denied. *F. Morgan Anglim* for petitioner. *W. T. Mathews*, Attorney General of Nevada, *Geo. P. Annand, William N. Dunseath, John W. Barrett*, Deputy Attorneys General, and *Alan Bible* for respondent. Reported below: 70 Nev. 65, 254 P. 2d 447.

No. 42, Misc. Slack *v.* United States. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Acting Solicitor General Stern, Assistant Attorney General Olney, Beatrice Rosenberg* and *Edward S. Szukelewicz* for the United States. Reported below: 203 F. 2d 152.

No. 76, Misc. Bradford *v.* Byers, U. S. District Judge. C. A. 2d Cir. Certiorari denied.

No. 107, Misc. McDade *v.* United States. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Acting Solicitor General Stern, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 206 F. 2d 494.

No. 109, Misc. Horton *v.* Skeen, Warden. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 117, Misc. Louisiana ex rel. Dartez *v.* Cozart, Superintendent of Louisiana State Penitentiary, et al. Supreme Court of Louisiana. Certiorari denied. *Rufus King* for petitioner.

No. 125, Misc. Dauer *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 204 F. 2d 141.

No. 135, Misc. Spears *v.* Transcontinental Bus System, Inc. et al. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Eugene R. Warren* for respondents.

No. 139, Misc. Wheeler *v.* West India Steamship Co. C. A. 2d Cir. Certiorari denied. *George J. Engelman* for petitioner. *J. Ward O'Neill* for respondent. Reported below: 205 F. 2d 354.

No. 148, Misc. Sharp *v.* Michigan. Supreme Court of Michigan. Certiorari denied.

No. 154, Misc. Clark *v.* Moore, Warden. Supreme Court of Kansas. Certiorari denied.

No. 166, Misc. Cephas *v.* Skeen, Warden. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 169, Misc. Shilakes *v.* Michigan. Supreme Court of Michigan. Certiorari denied.

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NOVEMBER 30, 1953.

Per Curiam Decisions.

No. 384. LARSON ET AL. *v.* CITY OF LONG BEACH. Appeal from the Superior Court for the County of Los Angeles, California, Appellate Department. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *John Charles Spence, Jr., Charles A. Horsky* and *Amy Ruth Mahin* for appellants. *Irving M. Smith* for appellee.

No. 391. F. H. VAHLSING, INC. *v.* MAINE. Appeal from the Supreme Judicial Court of Maine. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *Henry F. Schenk* for appellant. *Alexander A. LaFleur,* Attorney General of Maine, and *Boyd L. Bailey* and *Roger A. Putnam,* Assistant Attorneys General, for appellee. Reported below: 149 Me. 38, 98 A. 2d 559.

No. 386. RISS & CO., INC. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Western District of Missouri. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *John B. Gage* and *A. Alvis Layne, Jr.* for appellant. *Acting Solicitor General Stern* for the United States; *Edward M. Reidy* for the Interstate Commerce Commission; and *Amos M. Mathews* for the Akron, Canton & Youngstown Railroad Co. et al., appellees.

No. 409. BALTIMORE TRANSFER CO. ET AL. *v.* INTERSTATE COMMERCE COMMISSION ET AL. Appeal from the United States District Court for the District of Maryland. *Per Curiam:* The motion to affirm is granted and the

judgment is affirmed. *James J. Doherty* and *William Hoffenberg* for appellants. *Acting Solicitor General Stern* and *Edward M. Reidy* for the United States and the Interstate Commerce Commission, appellees. Reported below: 114 F. Supp. 558.

No. 393. TENNESSEE ET AL. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Middle District of Tennessee. *Per Curiam:* The motions to affirm are granted and the judgment is affirmed. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS dissent. *Alfred T. MacFarland* for the State of Tennessee et al., and *Joseph C. Swidler* for the Tennessee Valley Authority, appellants. *Charles J. McCarthy* was also of counsel. *Edward M. Reidy* and *Samuel R. Howell* for the Interstate Commerce Commission; and *James A. Bistline, A. J. Dixon, Frank W. Gwathmey, Edwin F. Hunt, Prime F. Osborn, William H. Swiggart* and *Charles P. Reynolds* for the Carolina, Clinchfield & Ohio Railway et al., appellees. Reported below: 113 F. Supp. 634.

No. 420. SCHWARTZ ET AL. *v.* KELLEY ET AL., MEMBERS OF THE LIQUOR CONTROL COMMITTEE. Appeal from the Supreme Court of Errors of Connecticut. *Per Curiam:* The appeal is dismissed for the want of a substantial federal question. *Abraham Davis Slavitt* for appellants. *William L. Beers*, Attorney General of Connecticut, and *Louis Weinstein*, Assistant Attorney General, for appellees. Reported below: 140 Conn. 176, 99 A. 2d 89.

Miscellaneous Orders.

No. 174. WHITE *v.* BALTIMORE & OHIO RAILROAD CO. Certiorari, 346 U. S. 810, to the United States Court of Appeals for the Sixth Circuit. Dismissed on motion of petitioner. *Paul M. Herbert* for petitioner. Reported below: 203 F. 2d 567.

No. 459. UNITED STATES *v.* JACOBS. Appeal from the United States District Court for the Eastern District of Wisconsin. Dismissed on motion of the appellant. *Acting Solicitor General Stern* for the United States. Reported below: 113 F. Supp. 203.

No. 354. AEBY ET UX. *v.* UNITED STATES. The motion of petitioner to withhold order denying petition for writ of certiorari, 346 U. S. 885, pending disposition of petition for rehearing is denied.

No. 366. UNITED STATES EX REL. ACCARDI *v.* SHAUGHNESSY, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE. Certiorari, 346 U. S. 884, to the United States Court of Appeals for the Second Circuit. The application for bail is granted and it is ordered that petitioner, Joseph Accardi, be admitted to bail upon the posting of a good and sufficient surety bond in the amount of twenty-five hundred ($2,500) dollars. The bond is to be approved by the United States District Court for the Southern District of New York or a judge thereof and when approved to be filed with the clerk of that court.

MR. JUSTICE REED, MR. JUSTICE JACKSON, and MR. JUSTICE CLARK would deny the application without prejudice to an application to proper authority.

No. 368, Misc., October Term, 1952. GOODMAN ET AL. *v.* MCMILLAN, TRUSTEE, ET AL. Petition to withdraw the order of October 19, 1953, 346 U. S. 853, and for further consideration denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application.

No. 143, Misc. SHELTON *v.* UNITED STATES. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit dismissed on motion of petitioner. Reported below: 205 F. 2d 806.

No. 146, Misc. OUTCAULT *v.* TEETS, WARDEN;
No. 162, Misc. ROBERTSON *v.* MARYLAND;
No. 171, Misc. BURKHOLDER *v.* UNITED STATES;
No. 172, Misc. KRELL *v.* SOUTH CAROLINA;
No. 173, Misc. BYERS *v.* UNITED STATES;
No. 188, Misc. BURKHOLDER *v.* UNITED STATES;
No. 196, Misc. WADLINGTON *v.* SAIN, SUPERINTENDENT, CHICAGO HOUSE OF CORRECTION;
No. 197, Misc. TAYLOR *v.* SWOPE, WARDEN;
No. 202, Misc. SHAFFER *v.* MAY, SUPERINTENDENT, ILLINOIS SECURITY HOSPITAL; and
No. 213, Misc. ALLBEE *v.* WEBB, WARDEN, ET AL. Motions for leave to file petitions for writs of habeas corpus denied.

No. 180, Misc. PINER *v.* UNITED STATES. Motion for leave to file petition for writ of certiorari denied.

No. 187, Misc. CURRY *v.* UNITED STATES; and
No. 193, Misc. SMITH *v.* NEW YORK. Applications denied.

No. 198, Misc. TAYLOR *v.* ROCHE, U. S. DISTRICT JUDGE. Motion for declaratory judgment denied.

No. 235, Misc. EX PARTE KEDROFF ET AL. Motion for leave to file petition for writ of mandamus denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS would issue a rule to show cause why leave to file should not be granted. *Philip Adler* for petitioners.

Probable Jurisdiction Noted.

No. 389. WALTERS ET AL. *v.* CITY OF ST. LOUIS ET AL. Appeal from the Supreme Court of Missouri. Probable jurisdiction noted. *Harry H. Craig* for appellants. Reported below: 364 Mo. 56, 259 S. W. 2d 377.

No. 439. UNITED STATES *v.* EMPLOYING LATHERS ASSOCIATION OF CHICAGO AND VICINITY ET AL. Appeal from the United States District Court for the Northern District of Illinois. Probable jurisdiction noted. *Acting Solicitor General Stern* for the United States. *Leo F. Tierney* for the Employing Lathers Association of Chicago and Vicinity et al.; and *Nathan M. Cohen* and *Robert S. Fiffer* for Local No. 74 of Wood, Wire and Metal Lathers International Union of Chicago and Vicinity, appellees. Reported below: 118 F. Supp. 387.

No. 440. UNITED STATES *v.* EMPLOYING PLASTERERS ASSOCIATION OF CHICAGO ET AL. Appeal from the United States District Court for the Northern District of Illinois. Probable jurisdiction noted. *Acting Solicitor General Stern* for the United States. *Howard Ellis* and *Perry S. Patterson* for appellees. Reported below: 118 F. Supp. 387.

No. 394. UNITED SHOE MACHINERY CORP. *v.* UNITED STATES. Appeal from the United States District Court for the District of Massachusetts. Probable jurisdiction noted. MR. JUSTICE CLARK took no part in the consideration or decision of this question. *John L. Hall* and *Claude R. Branch* for appellant. Reported below: 110 F. Supp. 295.

Certiorari Granted.

No. 307. SACHER *v.* ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK ET AL. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit granted limited to the following question:

"Accepting the facts as found in the memorandum decision of Chief Judge Hincks, does permanent disbarment

exceed the bounds of fair discretion, particularly in view of the punishment of petitioner's individual misconduct as a contempt and the finding that the proof does not establish that he so behaved pursuant to a conspiracy or a deliberate and concerted effort?"

MR. JUSTICE CLARK took no part in the consideration or decision of this application.

Telford Taylor for petitioner. *William C. Scott* for respondents. Reported below: 206 F. 2d 358.

No. 401. BROWNELL, ATTORNEY GENERAL, SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, *v.* SINGER; and

No. 402. SUPERINTENDENT OF BANKS OF THE STATE OF NEW YORK *v.* SINGER. Court of Appeals of New York. Certiorari granted. THE CHIEF JUSTICE took no part in the consideration or decision of these applications. *Acting Solicitor General Stern* for petitioner in No. 401. *Edward Feldman* and *Daniel Gersen* for petitioner in No. 402. *Albert R. Connelly* for respondent.

No. 404. JACOBSON, ADMINISTRATRIX, *v.* NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO. Petition for writ of certiorari to the United States Court of Appeals for the First Circuit granted limited to question No. 1 presented by the petition for the writ which reads as follows:

"Was there diversity of citizenship even though the defendant (a multiple corporation) was also incorporated in Massachusetts, which would confer jurisdiction upon the United States District Court for the District of Massachusetts?"

George P. Lordan, Herbert E. Tucker, Jr. and *Michael Carchia* for petitioner. *Paul F. Perkins* for respondent. Reported below: 206 F. 2d 153.

Certiorari Denied. (See also No. 180, Misc., supra.)

No. 280. PHILLIPS PETROLEUM CO. *v.* WISCONSIN ET AL.;

No. 281. TEXAS ET AL. *v.* WISCONSIN ET AL.; and

No. 418. FEDERAL POWER COMMISSION *v.* WISCONSIN ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Rayburn L. Foster, Harry D. Turner* and *Hugh B. Cox* for petitioner in No. 280. *John Ben Shepperd*, Attorney General, and *Charles E. Crenshaw*, Special Assistant Attorney General, for the State of Texas et al., *Mac Q. Williamson*, Attorney General, for the Corporation Commission of Oklahoma, and *Richard H. Robinson*, Attorney General, *George A. Graham*, Special Assistant Attorney General, and *L. C. White* for the State of New Mexico et al., petitioners in No. 281. *Acting Solicitor General Stern* and *Willard W. Gatchell* for petitioner in No. 418. *Vernon W. Thomson*, Attorney General, and *Stewart G. Honeck*, Deputy Attorney General, for the State of Wisconsin, *William E. Torkelson* for the Public Service Commission of Wisconsin, *David M. Proctor* and *Jerome M. Joffee* for Kansas City, Missouri, *James H. Lee* for Detroit, Michigan, and *Walter J. Mattison* and *Harry G. Slater* for Milwaukee, Wisconsin, respondents. Reported below: 92 U. S. App. D. C. 284, 205 F. 2d 706.

No. 319. DENVER & RIO GRANDE WESTERN RAILROAD CO. *v.* WHEAT. Supreme Court of Utah. Certiorari denied. *Dennis McCarthy* for petitioner. *Calvin W. Rawlings* for respondent. Reported below: 122 Utah —, 250 P. 2d 932.

No. 329. T. W. JONES GRAIN CO. *v.* NEBRASKA. Supreme Court of Nebraska. Certiorari denied. *Charles M. Bosley* for petitioner. *Clarence S. Beck*, Attorney

General of Nebraska, and *Dean G. Kratz*, Assistant Attorney General, for respondent. Reported below: 156 Neb. 822, 58 N. W. 2d 212.

No. 344. ARBULICH *v.* ARBULICH. Supreme Court of California. Certiorari denied. *Lawrence S. Lesser, Sidney H. Willner* and *Peter A. Schwabe* for petitioner. *Frank J. O'Brien* for respondent. Reported below: 41 Cal. 2d 86, 257 P. 2d 433.

No. 373. HOXSEY CANCER CLINIC ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Roy St. Lewis* for petitioners. *Acting Solicitor General Stern* for the United States. Reported below: See 207 F. 2d 567.

No. 377. BOURNE *v.* JONES. C. A. 5th Cir. Certiorari denied. *Hal H. McCaghren* for petitioner. *R. Bruce Jones* for respondent. Reported below: 207 F. 2d 173.

No. 378. FISHER, DOING BUSINESS AS FISHER PEN CO., *v.* DURKIN, SECRETARY OF LABOR. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Acting Solicitor General Stern, Bessie Margolin* and *Sylvia S. Ellison* for respondent. Reported below: 204 F. 2d 930.

No. 379. THE FLETERO ET AL. *v.* ARIAS. C. A. 4th Cir. Certiorari denied. *Hugh S. Meredith* for petitioners. *R. Arthur Jett* for respondent. Reported below: 206 F. 2d 267.

No. 387. GALLAGHER, ADMINISTRATRIX, ET AL. *v.* UNITED STATES LINES CO. ET AL. C. A. 2d Cir. Certiorari denied. *Philip F. Di Costanzo* for petitioners. *Raymond Parmer* and *Vernon Sims Jones* for the United States Lines Co.; and *Joseph Walker* for T. Hogan & Sons, Inc., respondents. Reported below: 206 F. 2d 177.

No. 388. WHEELING DOLLAR SAVINGS & TRUST CO., EXECUTOR, *v.* YOKE, COLLECTOR OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. *Charles D. Hamel, Benjamin H. Saunders* and *John Enrietto* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Holland, Ellis N. Slack, Lee A. Jackson* and *L. W. Post* for respondent. Reported below: 204 F. 2d 410.

No. 390. STOFFEL *v.* NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO. C. A. 2d Cir. Certiorari denied. *Victor Brudney* for petitioner. *Edward R. Brumley* and *R. M. Peet* for respondent. Reported below: 205 F. 2d 411.

No. 392. SIVALLS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *R. B. Cannon* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Holland, Ellis N. Slack* and *Lee A. Jackson* for the United States. Reported below: 205 F. 2d 444.

No. 395. MEREDITH *v.* JOHN DEERE PLOW CO. C. A. 8th Cir. Certiorari denied. *James Reginald Larson* for petitioner. *Raymond A. Smith* for respondent. Reported below: 206 F. 2d 196.

No. 396. DENNY ET AL. *v.* AUTOMOBILE INSURANCE CO. C. A. 8th Cir. Certiorari denied. *Paul Barnett* for petitioners. *Douglas Stripp* for respondent. Reported below: 206 F. 2d 401.

No. 400. COMI *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. *R. Palmer Ingram* for petitioner. *Edward D. E. Rollins*, Attorney General of Maryland, *J. Edgar Harvey*, Deputy Attorney General, and *Ambrose T. Hartman*, Assistant Attorney General, for respondent. Reported below: 202 Md. 472, 97 A. 2d 129.

No. 405. SMITH *v.* TENNESSEE. Supreme Court of Tennessee. Certiorari denied. *John A. Armstrong* for petitioner. *Roy H. Beeler*, Attorney General of Tennessee, and *Nat Tipton* for respondent.

No. 408. HENIS ET AL. *v.* EGAN ET AL. C. A. 4th Cir. Certiorari denied. *Ralph Montgomery Arkush* for petitioners. *Thomas C. Egan, Francis E. Walter* and *David J. Mays* for Egan et al.; and *Thomas F. Boyle* for Reeves et al., respondents. Reported below: 206 F. 2d 70.

No. 411. RESERVE LIFE INSURANCE CO. *v.* SIMPSON. C. A. 9th Cir. Certiorari denied. *George W. Mead* for petitioner. *William W. Banks* for respondent. Reported below: 206 F. 2d 389.

No. 413. FIDELITY-PHILADELPHIA TRUST CO., TRUSTEE, *v.* PIOCHE MINES CONSOLIDATED, INC. ET AL. C. A. 9th Cir. Certiorari denied. *Wm. Clarke Mason* and *Thomas B. K. Ringe* for petitioner. *Charles O. Bruce* for respondents. Reported below: 206 F. 2d 336.

No. 415. ATLANTIC COAST LINE RAILROAD CO. *v.* JOINER ET AL. C. A. 5th Cir. Certiorari denied. *Charles Cook Howell, Frank G. Kurka* and *U. B. Ellis* for petitioner. *Robert Culpepper, Jr.* for respondents. Reported below: 205 F. 2d 426.

No. 417. BRADSHAW ET AL. *v.* ROBINSON. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *H. Mason Welch* and *J. Joseph Barse* for petitioners. *Reginald B. Jackson* and *Richard W. Tompkins* for respondent. Reported below: 92 U. S. App. D. C. 216, 206 F. 2d 435.

No. 419. CONTINENTAL DISTILLING CORP. *v.* CENTURY DISTILLING CO. C. A. 3d Cir. Certiorari denied. *Robert T. McCracken, Leonard L. Kalish* and *Earl Jay Gratz* for petitioner. *Joseph S. Clark, Jr.* for respondent. Reported below: 205 F. 2d 140.

No. 421. JOHN McSHAIN, INC. *v.* DISTRICT OF COLUMBIA. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Fred J. Rice* and *Michael M. Doyle* for petitioner. *Vernon E. West, Chester H. Gray* and *George C. Updegraff* for respondent. Reported below: 92 U. S. App. D. C. 358, 205 F. 2d 882.

No. 426. GLOVER ET AL. *v.* McFADDIN ET AL. C. A. 5th Cir. Certiorari denied. *Lewis B. Perkins* for petitioners. *Will E. Orgain* for all respondents, *Earl A. Brown* for the Magnolia Petroleum Co., *Beeman Strong* and *Ewell Strong* for the Stanolind Oil Purchasing Co., and *Archie D. Gray* for the Gulf Oil Corporation et al., respondents. Reported below: 205 F. 2d 1.

No. 357. VASZORICH *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion certiorari should be granted. *Lemuel Skidmore* for petitioner. *J. Frank Weigand* for respondent. Reported below: 13 N. J. 99, 98 A. 2d 299.

No. 372. CITY OF GALVESTON *v.* MIRANDA ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BLACK is of the opinion certiorari should be granted. *Robert Richard Thornton* for petitioner. *M. L. Cook* for the Texas Employers' Insurance Association, respondent. Reported below: 205 F. 2d 468.

No. 403. LUNN *v.* F. W. WOOLWORTH CO. C. A. 9th Cir. Certiorari denied. MR. JUSTICE BLACK is of the

opinion certiorari should be granted. *Stephen S. Townsend* and *Carl Hoppe* for petitioner. *W. Bruce Beckley, A. W. Boyken* and *Randell Larson* for respondent. Reported below: 207 F. 2d 174.

No. 380. VOGT *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. *Floyd Duke James* for petitioner. *John Ben Shepperd*, Attorney General of Texas, and *James N. Castleberry, Jr., Sam C. Ratliff* and *Rudy G. Rice*, Assistant Attorneys General, for respondent. Reported below: 159 Tex. Cr. R. —, 258 S. W. 2d 795.

No. 410. BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM *v.* TRANSAMERICA CORPORATION. C. A. 3d Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion certiorari should be granted. MR. JUSTICE CLARK took no part in the consideration or decision of this application. *Acting Solicitor General Stern* for petitioner. *Gerhard A. Gesell* and *John Lord O'Brian* for respondent. Reported below: 206 F. 2d 163.

No. 416. REPSHOLDT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Jeremiah J. Buckley* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Burger, Paul A. Sweeney, Leavenworth Colby* and *Russell Chapin* for the United States. Reported below: 205 F. 2d 852.

No. 127, Misc. NIMRO *v.* DAVIS ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Reported below: 92 U. S. App. D. C. 293, 204 F. 2d 734.

No. 140, Misc. MASON *v.* CRANOR, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of

Washington. Certiorari denied. Reported below: 42 Wash. 2d 610, 257 P. 2d 211.

No. 144, Misc. SORIMPT *v.* CRANOR, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 147, Misc. GERALDON *v.* EDMONDSON, WARDEN. Supreme Court of Kansas. Certiorari denied.

No. 149, Misc. LILYROTH *v.* RAGEN, WARDEN. Circuit Court of Lee County, Illinois. Certiorari denied.

No. 150, Misc. CROSS *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 153, Misc. LANDGRAVER *v.* RAGEN, WARDEN. Circuit Court of Woodford County, Illinois. Certiorari denied.

No. 155, Misc. PICKWELL *v.* MONTGOMERY COUNTY COURT ET AL. Supreme Court of Pennsylvania, Eastern District. Certiorari denied.

No. 156, Misc. BAERCHUS *v.* TEES, WARDEN. C. A. 3d Cir. Certiorari denied.

No. 157, Misc. KOKEN *v.* OREGON STATE BAR. Supreme Court of Oregon. Certiorari denied. Reported below: 198 Ore. 659, 258 P. 2d 779.

No. 159, Misc. NICOL ET AL. *v.* JOHNSTON. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Jessie P. Grandy* for petitioners. *Godfrey L. Munter* for respondent. Reported below: 92 U. S. App. D. C. 265, 204 F. 2d 730.

No. 163, Misc. HOOVER, ADMINISTRATOR, *v.* PENNSYLVANIA ET AL. Supreme Court of Pennsylvania, Eastern District. Certiorari denied. Petitioner *pro se*. *Acting Solicitor General Stern, Assistant Attorney General Townsend, James D. Hill* and *George B. Searls* for Brownell, Attorney General, and *Howard H. Yocum* for Mock et al.; and *Frank F. Truscott*, Attorney General, and *Harry F. Stambaugh* for the State of Pennsylvania, respondents. Reported below: 372 Pa. 438, 94 A. 2d 357.

No. 165, Misc. CANNON *v.* SKEEN, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 167, Misc. FERRE *v.* RANDOLPH, WARDEN. Circuit Court of Piatt County, Illinois. Certiorari denied.

No. 168, Misc. ROSS *v.* CRANOR, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 170, Misc. ALLEN *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 174, Misc. HORTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Acting Solicitor General Stern, Assistant Attorney General Burger, Paul A. Sweeney* and *Russell Chapin* for the United States. Reported below: 207 F. 2d 91.

No. 175, Misc. RHODES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Acting Solicitor General Stern* for the United States. Reported below: 207 F. 2d 95.

No. 176, Misc. SMITH *v.* RAGEN ET AL. Circuit Court of Will County, Illinois. Certiorari denied.

No. 177, Misc. MORRIS *v.* HIATT, WARDEN. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Acting Solicitor General Stern, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for respondent.

No. 181, Misc. TITUS *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 185, Misc. CHARLES *v.* SKEEN, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 189, Misc. TISCIO *v.* TEES, WARDEN. Supreme Court of Pennsylvania, Eastern District. Certiorari denied.

No. 192, Misc. LANE *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 199, Misc. HOUSTON *v.* HEINZE, WARDEN. District Court of Appeal of California, Third Appellate District. Certiorari denied.

No. 200, Misc. BURKHOLDER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 209, Misc. DEPOMPEIS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

Rehearing Denied.

No. 131. COLLINS *v.* CALIFORNIA, *ante*, p. 803. Second petition for rehearing denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application.

No. 129. JONES *v.* UNITED STATES, *ante*, p. 854;

No. 232. CLARK *v.* TEXAS, *ante*, p. 855;

No. 235. TAWES *v.* CIE. DES MESSAGERIES MARITIMES, *ante*, p. 858;

No. 248. SCHWEGMANN BROTHERS GIANT SUPER MARKET ET AL. *v.* ELI LILLY & CO., *ante*, p. 856;

No. 252. UNIVERSAL MANUFACTURING CO. ET AL. *v.* FEDERAL TRADE COMMISSION, *ante*, p. 856; and

No. 257. JONES *v.* LYKES BROTHERS STEAMSHIP CO., INC., *ante*, p. 857. Petitions for rehearing denied.

No. 150. RUSSELL BOX CO. *v.* GRANT PAPER BOX CO., *ante*, p. 821;

No. 169. WHEELER *v.* MISSISSIPPI, *ante*, p. 852;

No. 181. DARGEL ET AL. *v.* SHERRARD, DIRECTOR OF DEFENSE RENTAL AREAS DIVISION, OFFICE OF DEFENSE MOBILIZATION, ET AL., *ante*, p. 835; and

No. 90, Misc. LESSER *v.* NEW YORK, *ante*, p. 840. Petitions for rehearing denied. THE CHIEF JUSTICE took no part in the consideration or decision of these applications.

No. 9, Misc. KEMMERER *v.* WARDEN, MICHIGAN STATE PENITENTIARY, *ante*, p. 858; and

No. 23, Misc. SHOTKIN *v.* ATCHISON, TOPEKA & SANTA FE R. CO. ET AL., *ante*, p. 860. Petitions for rehearing denied.

No. 372, Misc., October Term, 1952. SEVERA *v.* NEW JERSEY, 345 U. S. 929. Fifth petition for rehearing denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application.

No. 548, Misc., October Term, 1952. SEVERA *v.* MCCORKLE, ACTING WARDEN, 345 U. S. 990. Second petition for rehearing denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application.

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No. 61, Misc. WELLS *v.* CALIFORNIA, *ante*, p. 861. Motion for leave to file brief of John Pierce and others, as *amici curiae*, denied. Rehearing denied. THE CHIEF JUSTICE took no part in the consideration or decision of these applications.

DECEMBER 7, 1953.

Per Curiam Decisions.

No. 61. NEVADA AND NEW YORK *v.* STACHER. Certiorari, 345 U. S. 991, to the Seventh Judicial District Court of Nevada, in and for the County of White Pine. Argued November 12, 1953. Decided December 7, 1953. *Per Curiam:* Judgment reversed. *Biddinger* v. *Commissioner of Police*, 245 U. S. 128; *Pierce* v. *Creecy*, 210 U. S. 387.

Jack Streeter, Special Assistant Attorney General of Nevada, and *Paul W. Williams*, Special Assistant Attorney General of New York, argued the cause for petitioners. With them on the brief were *William T. Matthews*, Attorney General, and *George M. Dickerson*, Special Assistant Attorney General, for the State of Nevada, and *Nathaniel L. Goldstein*, Attorney General, *Wendell P. Brown*, Solicitor General, and *Edward L. Ryan*, Assistant Attorney General, for the State of New York. *Lemuel B. Schofield* filed an appearance for respondent.

No. 241. TOM WE SHUNG *v.* BROWNELL, ATTORNEY GENERAL, ET AL. Certiorari, 346 U. S. 854, to the United States Court of Appeals for the District of Columbia Circuit. Argued December 3–4, 1953. Decided December 7, 1953. *Per Curiam:* The judgment is vacated and the case is remanded to the District Court with directions to dismiss the complaint. *Heikkila* v. *Barber*, 345 U. S. 229. MR. JUSTICE BLACK would re-

verse the judgment of the Court of Appeals. MR. JUSTICE DOUGLAS and MR. JUSTICE JACKSON dissent.

Jack Wasserman argued the cause and filed a brief for petitioner. *Murray L. Schwartz* argued the cause for respondents. With him on the brief were *Acting Solicitor General Stern, Assistant Attorney General Olney, Beatrice Rosenberg, J. F. Bishop, L. Paul Winings* and *Maurice A. Roberts*. Reported below: 93 U. S. App. D. C. —, 207 F. 2d 132.

No. 375. UNITED STATES *v.* ARIZONA ET AL. On petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit. *Per Curiam:* The petition for writ of certiorari is granted and the judgment is reversed. *Hoiness* v. *United States*, 335 U. S. 297.

Acting Solicitor General Stern for the United States. *Ross F. Jones*, Attorney General of Arizona, *Timothy D. Parkman*, Special Assistant to the Attorney General, and *Irwin Cantor*, Assistant to the Attorney General, for respondents. Reported below: 206 F. 2d 159.

No. 443. FOSTER ET AL. *v.* BAY ET AL. Appeal from the Court of Civil Appeals of Texas, First Supreme Judicial District. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *Henry H. Brooks* for appellants. *John Ben Shepperd*, Attorney General of Texas, *Phillip Robinson*, Assistant Attorney General, *Charles L. Black* and *Charles W. Bell* for appellees. Reported below: 255 S. W. 2d 898.

Miscellaneous Orders.

No. 112, Misc. EMERSON *v.* CALLAHAN, SHERIFF; and No. 201, Misc. WILLIAMS *v.* SMYTH, SUPERINTENDENT, VIRGINIA STATE PENITENTIARY. Motions for leave to file petitions for writs of habeas corpus denied.

No. 204, Misc. VALYKEO *v.* WEST VIRGINIA; and

No. 227, Misc. TAYLOR *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA ET AL. Motions for leave to file petitions for writs of mandamus denied.

No. 222, Misc. VAN NEWKIRK *v.* NEW YORK ET AL. Application denied.

Probable Jurisdiction Noted.

No. 427. FRANKLIN NATIONAL BANK OF FRANKLIN SQUARE *v.* NEW YORK. Appeal from the Court of Appeals of New York. Probable jurisdiction noted. *Sidney Friedman, F. Gloyd Awalt* and *Samuel O. Clark, Jr.* for appellant. *Acting Solicitor General Stern* filed a memorandum for the United States and *Peter Keber* filed a brief for the New York State Bankers Association, as *amici curiae*, supporting the statement of appellant as to jurisdiction. Reported below: 305 N. Y. 453, 113 N. E. 2d 796.

Certiorari Granted. (*See also No. 375, supra.*)

No. 423. BENTSEN ET AL. *v.* BLACKWELL ET AL. C. A. 5th Cir. Certiorari granted. *Paul A. Porter* and *Milton V. Freeman* for petitioners. *Garland F. Smith* for respondents. *Acting Solicitor General Stern, William H. Timbers* and *Alexander Cohen* filed a memorandum for the Securities and Exchange Commission, as *amicus curiae*. Reported below: 203 F. 2d 690.

Certiorari Denied.

No. 289. REED ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Victor E. Cappa* for petitioners. *Acting Solicitor General Stern, Assistant Attorney General Olney, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 205 F. 2d 216.

No. 349. Southern Pacific Co. *v.* Miller, Administratrix. District Court of Appeal of California, First Appellate District. Certiorari denied. *Arthur B. Dunne* for petitioner. *Clifton Hildebrand* for respondent. Reported below: 117 Cal. App. 2d 492, 256 P. 2d 603.

No. 364. Investors Royalty Co., Inc. *v.* Market Trend Survey, Inc. et al. C. A. 10th Cir. Certiorari denied. *Neal E. McNeill* for petitioner. Reported below: 206 F. 2d 108.

No. 399. Land Settlement & Development Corp. *v.* United States. Court of Claims. Certiorari denied. *Joseph P. Tumulty, Jr.* and *M. Joseph Matan* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Burger, Paul A. Sweeney* and *Herman Marcuse* for the United States. Reported below: 125 Ct. Cl. 543, 113 F. Supp. 666.

No. 424. Westinghouse Electric Corp. *v.* Bulldog Electric Products Co. C. A. 4th Cir. Certiorari denied. *James M. Guiher* and *Ralph H. Swingle* for petitioner. *Arthur W. Dickey* and *S. Eugene Bychinsky* for respondent. Reported below: 206 F. 2d 574.

No. 432. Morand Brothers Beverage Co. et al. *v.* National Labor Relations Board. C. A. 7th Cir. Certiorari denied. *Leo F. Tierney* and *Louis A. Kohn* for petitioners. *Acting Solicitor General Stern, George J. Bott, David P. Findling* and *Dominick L. Manoli* for respondent. Reported below: 204 F. 2d 529.

No. 436. Pearson et al. *v.* Gariepy. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *William A. Roberts, Warren Woods, Irene Kennedy* and *John Donovan* for petitioners. *David*

W. Louisell, Frank J. Whalen, Jr. and *John J. Sloan* for respondent. Reported below: 92 U. S. App. D. C. 337, 207 F. 2d 15.

No. 441. WESTERN PACIFIC RAILROAD CORP. ET AL. *v.* WESTERN PACIFIC RAILROAD CO. ET AL.; and

No. 463. METZGER ET AL. *v.* WESTERN PACIFIC RAILROAD CO. ET AL. C. A. 9th Cir. Certiorari denied. *Moses Lasky, Frank C. Nicodemus, Jr.* and *Norris Darrell* for petitioners in No. 441. *William E. Haudek, Julius Levy, Webster V. Clark* and *David Freidenrich* for petitioners in No. 463. *Allan P. Matthew, James D. Adams, Robert L. Lipman, Burnham Enersen* and *Walker W. Lowry* for the Western Pacific Railroad Co. et al.; and *Everett A. Mathews, A. Donald MacKinnon* and *Forbes D. Shaw* for the Western Realty Co., respondents. Reported below: 206 F. 2d 495.

No. 446. OVERMAN *v.* LOESSER. C. A. 9th Cir. Certiorari denied. *Fred H. Miller* for petitioner. *Joseph P. Loeb* for respondent. Reported below: 205 F. 2d 521.

No. 356. CRISCO *v.* MURDOCK ACCEPTANCE CORP. ET AL. Supreme Court of Arkansas. Certiorari denied. *T. J. Gentry* and *Tilghman E. Dixon* for petitioner. *Lowell W. Taylor* and *E. L. McHaney, Jr.* for respondents. Reported below: 222 Ark. ——, 258 S. W. 2d 551.

No. 428. TEETS, WARDEN, ET AL. *v.* THOMAS. C. A. 9th Cir. Certiorari denied. MR. JUSTICE REED and MR. JUSTICE JACKSON are of the opinion certiorari should be granted. THE CHIEF JUSTICE took no part in the consideration or decision of this application. *Edmund G. Brown*, Attorney General of California, *Clarence A. Linn*, Assistant Attorney General, and *Charles E. McClung*, Deputy Attorney General, for petitioners. Reported below: 205 F. 2d 236.

No. 447. Bearing Jobbers, Inc. et al. *v.* Nice Ball Bearing Co. C. A. 7th Cir. Certiorari denied. *Floyd E. Thompson* for petitioners. *Frank F. Fowle, Jr.* and *John R. Young* for respondent. Reported below: 205 F. 2d 841.

No. 3, Misc. Scalf *v.* Skeen, Warden. Petition for writ of certiorari to the Supreme Court of Appeals of West Virginia denied for the reason that the judgment below is based upon a non-federal ground adequate to support it. Petitioner *pro se*. *John G. Fox*, Attorney General of West Virginia, and *T. D. Kauffelt*, Assistant Attorney General, for respondent.

No. 186, Misc. Garton et al. *v.* Colorado. Supreme Court of Colorado. Certiorari denied. *Francis P. O'Neill* for petitioners. *Duke Dunbar*, Attorney General of Colorado, *Frank A. Wachob*, Deputy Attorney General, and *Norman H. Comstock*, Assistant Attorney General, for respondent.

No. 190, Misc. Hayslip *v.* Wellford et al. Supreme Court of Tennessee. Certiorari denied. Petitioner *pro se*. *Walter P. Armstrong, Jr.* and *W. Preston Battle* for respondents. Reported below: 196 Tenn. 621, 263 S. W. 2d 136.

No. 191, Misc. DeMarios *v.* Illinois. Supreme Court of Illinois. Certiorari denied.

No. 195, Misc. Supero *v.* Illinois. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 203, Misc. Dohrman *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 205, Misc. FARMER *v.* SKEEN, WARDEN, ET AL. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 206, Misc. PUTNAM *v.* SKEEN, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 207, Misc. MARRON *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 208, Misc. DAVIS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 214, Misc. MADDALENA *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 215, Misc. HUNTER *v.* EIDSON, WARDEN. Supreme Court of Missouri. Certiorari denied.

No. 219, Misc. WILLIS *v.* ELLIS, GENERAL MANAGER, TEXAS PRISON SYSTEM. Court of Criminal Appeals of Texas. Certiorari denied.

No. 221, Misc. HOLLOWAY *v.* LOONEY, WARDEN. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Acting Solicitor General Stern, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for respondent. Reported below: 207 F. 2d 433.

No. 223, Misc. FORD *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 229, Misc. CRAIG *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 230, Misc. NELSON *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 233, Misc. BALDRIDGE *v.* RAGEN, WARDEN. Circuit Court of Madison County, Illinois. Certiorari denied.

No. 248, Misc. HINDERHAN *v.* RANDOLPH, WARDEN. Circuit Court of Madison County, Illinois. Certiorari denied.

Rehearing Denied.

No. 177. McELROY *v.* McELROY, *ante*, p. 857;

No. 245. McELROY *v.* COBOURN ET AL., DOING BUSINESS AS COBOURN, YAGER, NOTNAGEL, SMITH & MORAN, *ante*, p. 857;

No. 320. SACKETT *v.* LOUISIANA, *ante*, p. 869; and

No. 326. FLETCHER *v.* NOSTADT ET AL., *ante*, p. 877. Petitions for rehearing denied.

No. 190. INTERNATIONAL WORKERS ORDER, INC. *v.* NEW YORK, BY BOHLINGER, SUPERINTENDENT OF INSURANCE, ET AL.; and

No. 283. SELIGSON ET AL. *v.* NEW YORK, BY BOHLINGER, SUPERINTENDENT OF INSURANCE, *ante*, p. 857. Petitions for rehearing denied. MR. JUSTICE CLARK took no part in the consideration or decision of these applications.

No. 43, Misc. READER *v.* ILLINOIS, *ante*, p. 841. Rehearing denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application.

DECEMBER 14, 1953.

Miscellaneous Orders.

No. 5, Original, October Term, 1950. NEW JERSEY *v.* NEW YORK ET AL. The applications of New Jersey and Pennsylvania for an extension of time within which to answer the amended petition of the City of New York are

granted and the time is extended to and including December 31, next. *Kenneth H. Murray*, Deputy Attorney General, for the State of New Jersey. *Frank F. Truscott*, Attorney General, and *William A. Schnader* for the State of Pennsylvania.

Probable Jurisdiction Noted.

No. 464. UNITED STATES *v.* BORDEN COMPANY ET AL. Appeal from the United States District Court for the Northern District of Illinois. Probable jurisdiction noted. *Acting Solicitor General Stern* for the United States. *Stuart S. Ball* for the Borden Company et al., *L. Edward Hart, Jr.* for the Bowman Dairy Co. et al., and *Leo F. Tierney* for the Beloit Dairy Co., appellees. Reported below: 111 F. Supp. 562.

Certiorari Granted.

No. 287. ALASKA STEAMSHIP CO., INC. *v.* PETTERSON. C. A. 9th Cir. Certiorari granted. *Stanley B. Long* for petitioner. *Samuel B. Bassett* for respondent. Reported below: 205 F. 2d 478.

No. 431. BARBER, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, *v.* GONZALES. C. A. 9th Cir. Certiorari granted. *Acting Solicitor General Stern* for petitioner. Reported below: 207 F. 2d 398.

No. 449. UNITED STATES *v.* GILMAN. C. A. 9th Cir. Certiorari granted. *Acting Solicitor General Stern* for the United States. *Rolland Lee Nutt* for respondent. Reported below: 206 F. 2d 846.

Certiorari Denied.

No. 374. HARAD ET AL., DOING BUSINESS AS INDUSTRIAL ENGINEERING ASSOCIATES, *v.* SEARS, ROEBUCK & CO. C. A. 7th Cir. Certiorari denied. *Paul Mendenhall* for

petitioners. *Charles Lederer, Frank H. Marks* and *Ivan P. Tashof* for respondent. Reported below: 204 F. 2d 14.

No. 385. HENDERSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Bernard A. Golding* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 206 F. 2d 300.

No. 422. ROMANIAN ORTHODOX MISSIONARY EPISCOPATE OF AMERICA *v.* TRUTZA ET AL. C. A. 6th Cir. Certiorari denied. *Don C. Miller* for petitioner. *Percy H. Russell* for respondents. Reported below: 205 F. 2d 107.

No. 430. SWIDLER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Joseph F. McVeigh, Francis J. Myers* and *Cornelius C. O'Brien* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Holland, Ellis N. Slack* and *Joseph M. Howard* for the United States. Reported below: 207 F. 2d 47.

No. 437. WALL *v.* KING. C. A. 1st Cir. Certiorari denied. *George P. Lordan, Herbert E. Tucker, Jr.* and *Michael Carchia* for petitioner. *George Fingold,* Attorney General of Massachusetts, *Henry M. Leen,* Special Assistant to the Attorney General, and *John J. Burns* for respondent. Reported below: 206 F. 2d 878.

No. 442. FIDELITY-PHENIX FIRE INSURANCE CO. *v.* FLOTA MERCANTE DEL ESTADO. C. A. 5th Cir. Certiorari denied. *Eberhard P. Deutsch* and *René H. Himel, Jr.* for petitioner. *L. deGrove Potter* for respondent. Reported below: 205 F. 2d 886.

No. 444. CITY OF ERLANGER *v.* BERKEMEYER ET AL. C. A. 6th Cir. Certiorari denied. *Chas. I. Dawson* for petitioner. *Frank H. Shaffer, Jr.* for respondents. Reported below: 207 F. 2d 832.

No. 448. PETERMICHL *v.* CHICAGO & NORTHWESTERN RAILWAY CO. C. A. 7th Cir. Certiorari denied. *Louis G. Davidson* and *Louis P. Miller* for petitioner. *Otis Lowell Hastings* and *Drennan J. Slater* for respondent. Reported below: 205 F. 2d 434.

No. 105, Misc. VASCOVICH *v.* SKEEN, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied. Reported below: 138 W. Va. —, 76 S. E. 2d 283.

No. 182, Misc. SANDERS ET AL. *v.* GLENSHAW GLASS CO., INC. C. A. 3d Cir. Certiorari denied. Reported below: 204 F. 2d 436.

No. 217, Misc. LANG *v.* McGEE, DIRECTOR OF CORRECTIONS, ET AL. Supreme Court of California. Certiorari denied.

No. 218, Misc. BISHOP *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 1 Ill. 2d 60, 114 N. E. 2d 566.

No. 232, Misc. VOLA *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

Nos. 237, Misc., and 245, Misc. STEWART *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 259, Misc. CERVANTES *v.* BERGAN, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 239, Misc. CHESSMAN *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application. Reported below: 205 F. 2d 128.

Rehearing Granted.

No. 352. THOMPSON *v.* LAWSON, DEPUTY COMMISSIONER OF THE UNITED STATES BUREAU OF EMPLOYEES COMPENSATION, ET AL. The petition for rehearing is granted and the order entered November 16, 1953, granting certiorari, *ante*, p. 884, is vacated.

Rehearing Denied.

No. 18. TOOLSON *v.* NEW YORK YANKEES, INC. ET AL., *ante*, p. 356;

No. 23. KOWALSKI *v.* CHANDLER, COMMISSIONER OF BASEBALL, ET AL., *ante*, p. 356;

No. 25. CORBETT ET AL. *v.* CHANDLER, COMMISSIONER OF BASEBALL, ET AL., *ante*, p. 356;

No. 229. HAINES ET AL., COMPRISING KEYSTONE POLICYHOLDERS' COMMITTEE, *v.* PENNSYLVANIA ET AL., *ante*, p. 852;

No. 323. FRANKLIN, REGIONAL COUNSEL, WAGE STABILIZATION BOARD, ET AL. *v.* JONCO AIRCRAFT CORP., *ante*, p. 868;

No. 340. LEONARD ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE, *ante*, p. 876;

No. 343. AIKEN *v.* RICHARDSON, *ante*, p. 869;

No. 354. AEBY ET UX. *v.* UNITED STATES, *ante*, p. 885;

No. 361. GUIBERSON CORPORATION *v.* GARRETT OIL TOOLS, INC., *ante*, p. 886; and

No. 369. KEYSTONE METAL CO. *v.* CITY OF PITTSBURGH ET AL., *ante*, p. 887. Petitions for rehearing denied.

No. 388, Misc., October Term, 1952. HOURIHAN *v.* NATIONAL LABOR RELATIONS BOARD ET AL., 345 U. S. 930. Fourth petition for rehearing denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application.

No. 64. FEHSENFELD ET AL. *v.* WHIPPLE ET AL., *ante*, p. 813;

No. 238. MCGEE *v.* NORTH CAROLINA, *ante*, p. 802;

No. 15, Misc. NEAL *v.* RANDOLPH, WARDEN, *ante*, p. 836;

No. 151, Misc. LEVY *v.* CALIFORNIA, *ante*, p. 883; and

No. 525, Misc., October Term, 1952. BRINK *v.* UNITED STATES, 345 U. S. 1001. Petitions for rehearing denied. THE CHIEF JUSTICE took no part in the consideration or decision of these applications.

No. 511, Misc., October Term, 1952. LEE *v.* TENNESSEE, 345 U. S. 1003. Third petition for rehearing denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application.

No. 135, Misc. SPEARS *v.* TRANSCONTINENTAL BUS SYSTEM, INC. ET AL., *ante*, p. 889;

No. 138, Misc. TAYLOR *v.* UNITED STATES BOARD OF PAROLE, *ante*, p. 883;

No. 152, Misc. TAYLOR *v.* UNITED STATES BOARD OF PAROLE, *ante*, p. 883; and

No. 158, Misc. TAYLOR *v.* SWOPE, WARDEN, *ante*, p. 883. Petitions for rehearing denied.

JANUARY 4, 1954.

Per Curiam Decisions.

No. 81. NATIONAL LABOR RELATIONS BOARD *v.* BILL DANIELS, INC. ET AL. On petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit. *Per Curiam:* The petition for writ of certiorari is granted and the judgment is reversed. *Howell Chevrolet Co.* v. *Labor Board*, 346 U. S. 482. *Acting Solicitor Gen-*

eral Stern and *George J. Bott* for petitioner. *Frank E. Kenney* and *Harold E. Mountain, Jr.* for respondents. Reported below: 202 F. 2d 579.

Nos. 433 and 434. RINES, ADMINISTRATOR, *v.* JUSTICES OF THE SUPERIOR COURT. Appeals from the Supreme Judicial Court of Massachusetts. *Per Curiam:* The appeals are dismissed for the want of a substantial federal question. *David Rines* for appellant. Reported below: 330 Mass. 368, 113 N. E. 2d 817.

No. 478. BUCK *v.* BOARD OF MEDICAL EXAMINERS OF OREGON. Appeal from the Supreme Court of Oregon. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. MR. JUSTICE BURTON took no part in the consideration or decision of this case. *Ralph E. Moody* for appellant. *Howard I. Bobbitt* for appellee. Reported below: 200 Ore. 488, 258 P. 2d 124.

No. 486. SOUTHERN PACIFIC CO. *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA ET AL. Appeal from the Supreme Court of California. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. THE CHIEF JUSTICE took no part in the consideration or decision of this case. *George L. Buland, Evan J. Foulds, James E. Lyons, Robert L. Pierce* and *Charles W. Burkett, Jr.* for appellant. *Everett C. McKeage* for appellees. Reported below: 41 Cal. 2d 354, 260 P. 2d 70.

Miscellaneous Orders.

No. 505. GOVERNMENT AND CIVIC EMPLOYEES ORGANIZING COMMITTEE, CIO, ET AL. *v.* WINDSOR ET AL. Appeal from the United States District Court for the

Northern District of Alabama. The motion for an injunction is denied. MR. JUSTICE BLACK took no part in the consideration or decision of this motion. *Arthur J. Goldberg* and *Thomas E. Harris* for appellants. *Si Garrett*, Attorney General of Alabama, *M. Roland Nachman, Jr.*, Assistant Attorney General, and *Jesse M. Williams* for appellees.

No. 368, Misc., October Term, 1952. GOODMAN ET AL. *v.* MCMILLAN, TRUSTEE, ET AL. Petition to withdraw the order of November 30, 1953, 346 U. S. 892, and for further consideration denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application.

No. 160, Misc. HYSER *v.* UNITED STATES. Motion for leave to file petition for writ of mandamus or writ of certiorari denied.

No. 260, Misc. SAM *v.* CRANOR, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY; and

No. 261, Misc. ROLLAND *v.* MICHIGAN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 184, Misc. DAVIS *v.* WEST VIRGINIA ET AL.; and

No. 262, Misc. EX PARTE JACOBS. Motions for leave to file petitions for writs of mandamus denied.

No. 280, Misc. PINER *v.* UNITED STATES. Motion for leave to file petition for writ of certiorari denied.

Probable Jurisdiction Noted.

No. 450. ALLEN, CHAIRMAN, TWELFTH REGION WAGE STABILIZATION BOARD, ET AL. *v.* GRAND CENTRAL AIRCRAFT CO. Appeal from the United States District Court for the Northern District of California. Probable

jurisdiction noted. *Acting Solicitor General Stern* for appellants. *Paul R. Watkins* and *Dana Latham* for appellee. Reported below: 114 F. Supp. 389.

No. 476. BRANIFF AIRWAYS, INC. *v.* NEBRASKA STATE BOARD OF EQUALIZATION AND ASSESSMENT ET AL. Appeal from the Supreme Court of Nebraska. Probable jurisdiction noted. *William J. Hotz* and *William J. Hotz, Jr.* for appellant. Reported below: 157 Neb. 425, 59 N. W. 2d 746.

Certiorari Granted. (*See also No. 81, supra.*)

No. 352. THOMPSON *v.* LAWSON, DEPUTY COMMISSIONER OF THE UNITED STATES BUREAU OF EMPLOYEES COMPENSATION, ET AL. C. A. 5th Cir. Certiorari granted. *David Carliner* and *Thomas M. Cooley, II*, for petitioner. *Acting Solicitor General Stern* for the Deputy Commissioner; and *George W. Ericksen* for the Gulf Florida Terminal Co., Inc. et al., respondents. Reported below: 205 F. 2d 527.

Certiorari Denied. (*See also Misc. Nos. 160 and 280, supra.*)

No. 196. NOBLE *v.* COOKE ET AL. Court of Civil Appeals of Texas, Sixth Supreme Judicial District. Certiorari denied. *John H. Coffman* for petitioner. *Charles Potter, James G. Strong, Marshall Newcomb* and *Angus G. Wynne* for respondents. Reported below: 253 S. W. 2d 911.

No. 330. AMERICAN BOTTLING CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. *Park Street* and *Joseph G. Street* for petitioner. *Acting Solicitor General Stern, George J. Bott, David P. Findling, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 205 F. 2d 421.

No. 381. STATE CORPORATION COMMISSION OF KANSAS *v.* FEDERAL POWER COMMISSION ET AL.;

No. 382. NORTHERN NATURAL GAS CO. *v.* FEDERAL POWER COMMISSION ET AL.; and

No. 469. FEDERAL POWER COMMISSION *v.* NORTHERN NATURAL GAS CO. ET AL. C. A. 8th Cir. Certiorari denied. *Jay Kyle* and *Louis R. Gates* for petitioner in No. 381. *Richard J. Connor, Lawrence I. Shaw* and *F. Vinson Roach* for the Northern Natural Gas Co. *Acting Solicitor General Stern* and *Willard W. Gatchell* for the Federal Power Commission in Nos. 381, 382 and 469. Also *Assistant Attorney General Burger, Melvin Richter, Herman Marcuse* and *Reuben Goldberg* for the Federal Power Commission in Nos. 381 and 382. *Donald Evans* for the Iowa Power & Light Co., *Raymond A. Smith* for the Council Bluffs Gas Co., *George C. Pardee* for the Metropolitan Utilities District of Omaha, *Clarence H. Ross* for the Central Electric & Gas Co., *P. L. Farnand* and *G. T. Mullin* for the Minneapolis Gas Co., *Carl W. Cummins* for the Northern States Power Co., *Franklin M. Stone* for the Western States Utilities Co., *Norman H. Nitzkowski* for the Minnesota Valley Natural Gas Co., *George B. Sjoselius*, Deputy Attorney General, for the State of Minnesota, and *John F. Bonner* for the City of Minneapolis, respondents in Nos. 381 and 382. Reported below: 206 F. 2d 690.

No. 397. FIELD, TEMPORARY RECEIVER, *v.* UNITED STATES. Court of Claims. Certiorari denied. *George Halpern* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Burger, Paul A. Sweeney, Leavenworth Colby* and *Hubert H. Margolies* for the United States. Reported below: 125 Ct. Cl. 559, 113 F. Supp. 190.

No. 425. OLIVER UNITED FILTERS, INC. *v.* SILVER. C. A. 10th Cir. Certiorari denied. *Oscar A. Mellin, LeRoy Hanscom* and *Jack E. Hursh* for petitioner. *Charles J. Beise* for respondent. Reported below: 206 F. 2d 658.

No. 429. DEVITA *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. *Harry Kay* for petitioner. *C. William Caruso* for respondent. Reported below: 13 N. J. 341, 99 A. 2d 589.

No. 445. CHASSEN, TRUSTEE IN BANKRUPTCY, *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Benjamin Weintraub* and *Harris Levin* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Holland, Ellis N. Slack, Lee A. Jackson* and *I. Henry Kutz* for the United States. Reported below: 207 F. 2d 83.

No. 451. LLANOS ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Hyman M. Greenstein* for petitioners. *Acting Solicitor General Stern, Assistant Attorney General Olney, Beatrice Rosenberg, William H. Timbers, Alexander Cohen* and *Henry L. Stern* for the United States. Reported below: 206 F. 2d 852.

No. 452. BUZZA-CARDOZO, A CORPORATION, *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. *Carl M. Gould* for petitioner. *Acting Solicitor General Stern, George J. Bott, David P. Findling* and *Dominick L. Manoli* for respondent. Reported below: 205 F. 2d 889.

No. 453. FINE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *W. E. Badgett* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 207 F. 2d 324.

No. 455. WEISS *v.* JOHNSON, COLLECTOR OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Morley S. Wolfe* and *Samuel Kalmanash* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Holland, Ellis N. Slack, Harry Baum* and *Fred E. Youngman* for respondent. Reported below: 206 F. 2d 350.

No. 461. COAKER *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. *Emmett J. Rahm* for petitioner. *John Ben Shepperd*, Attorney General of Texas, for respondent.

No. 462. KILGORE *v.* MCKETHAN ET AL. C. A. 5th Cir. Certiorari denied. *Rufus King* and *B. Downey Rice* for petitioner. *Wallace E. Sturgis, Charles A. Savage, Weldon G. Starry, Chester Bedell, Carl E. Duncan, Doyle E. Carlton* and *O. K. Reaves* for respondents. Reported below: 205 F. 2d 425.

No. 466. ABNEY ET VIR *v.* CAMPBELL, COLLECTOR OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. *R. Dean Moorhead* for petitioners. *Acting Solicitor General Stern, Assistant Attorney General Holland, Ellis N. Slack* and *Harry Marselli* for respondent. Reported below: 206 F. 2d 836.

No. 467. WEISS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Sidney Morse* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Burger* and *Paul A. Sweeney* for the United States. Reported below: 207 F. 2d 503.

No. 470. PUBLICKER *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. *Earl Jay Gratz* for petitioner. *Acting Solicitor General Stern,*

Assistant Attorney General Holland, Ellis N. Slack, Robert N. Anderson and *Fred E. Youngman* for respondent. Reported below: 206 F. 2d 250.

No. 473. ALKER ET AL. *v.* BUTCHER & SHERRERD ET AL. C. A. 3d Cir. Certiorari denied. *Francis E. Walters, Edwin Hall, II,* and *Harry J. Alker, Jr.* for petitioners. *Thomas Raeburn White* and *Thomas B. K. Ringe* for respondents. Reported below: 206 F. 2d 259.

No. 456. HUGHES CONSTRUCTION CO. *v.* SECRETARY OF LABOR. C. A. 5th Cir. Mitchell, present Secretary of Labor, substituted as the party respondent. Certiorari denied. *Eberhard P. Deutsch* and *René H. Himel, Jr.* for petitioner. *Acting Solicitor General Stern, Bessie Margolin* and *Sylvia S. Ellison* for respondent. Reported below: 206 F. 2d 505.

No. 465. VILES *v.* SCOFIELD ET AL. Supreme Court of Colorado. Certiorari denied. Reported below: 128 Colo. 185, 261 P. 2d 148.

No. 102, Misc. JOHNSON *v.* IOWA. Supreme Court of Iowa. Certiorari denied. Reported below: 60 N. W. 2d 99.

No. 130, Misc. FERGUSON *v.* SKEEN, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 136, Misc. BROWN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se. Acting Solicitor General Stern, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 204 F. 2d 298.

No. 141, Misc. HENDERSON *v.* MICHIGAN. Circuit Court for the County of Macomb, Michigan. Certiorari denied. *Ernest Goodman* for petitioner. *Edmund E. Shepherd,* Solicitor General of Michigan, for respondent.

No. 142, Misc. ESTERS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se. Acting Solicitor General Stern, Assistant Attorney General Olney, Beatrice Rosenberg* and *John R. Wilkins* for the United States.

No. 212, Misc. HARROD *v.* LADY, WARDEN, ET AL. Court of Appeals of Kentucky. Certiorari denied. Reported below: 260 S. W. 2d 470.

No. 220, Misc. LEPERA *v.* BURKE, WARDEN. Supreme Court of Pennsylvania, Eastern District. Certiorari denied.

No. 224, Misc. STAFFORD *v.* RUSSELL ET AL. District Court of Appeal of California, Second Appellate District. Certiorari denied. Petitioner *pro se. Gilbert E. Harris* for respondents. Reported below: 117 Cal. App. 2d 319, 255 P. 2d 872.

No. 228, Misc. LOSINGER *v.* BANNAN, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 205 F. 2d 676.

No. 231, Misc. LEWIS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 234, Misc. ARTERBURN *v.* HAHN, WARDEN. Supreme Court of Nebraska. Certiorari denied.

No. 238, Misc. IRVIN *v.* FLORIDA. Supreme Court of Florida. Certiorari denied. *Thurgood Marshall* and *Jack Greenberg* for petitioner. Reported below: 66 So. 2d 288.

No. 240, Misc. KITZINGER *v.* CLAUDY ET AL. Supreme Court of Pennsylvania, Western District. Certiorari denied.

No. 241, Misc. PRUDEAUX *v.* WASHINGTON. Supreme Court of Washington. Certiorari denied.

No. 242, Misc. FOLEY *v.* ILLINOIS ET AL. Supreme Court of Illinois. Certiorari denied.

No. 246, Misc. MEYERS *v.* BARTLEY, CIRCUIT COURT JUDGE. Circuit Court of Will County, Illinois. Certiorari denied.

No. 249, Misc. THOMPSON *v.* RANDOLPH, WARDEN. Circuit Court of Randolph County, Illinois. Certiorari denied.

No. 252, Misc. BYRNES *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 256, Misc. ORR *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 257, Misc. BLACKWELL *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 263, Misc. DAYTON *v.* SKEEN, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 267, Misc. HOLLENBECK *v.* CRANOR, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 270, Misc. WRIGHT *v.* SKEEN, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 271, Misc. DAVIS *v.* SKEEN, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

Rehearing Denied.

No. 265. WETHERBEE, ADMINISTRATRIX, *v.* ELGIN, JOLIET & EASTERN RAILWAY CO., *ante*, p. 867;

No. 311. UNITED STATES *v.* FRYER, *ante*, p. 885;

No. 324. J. & L. SNOUFFER, INC. *v.* ADAMS ET AL., *ante*, p. 874;

No. 371. LOS ANGELES COUNTY PIONEER SOCIETY *v.* HISTORICAL SOCIETY OF SOUTHERN CALIFORNIA ET AL., *ante*, p. 888;

No. 378. FISHER, DOING BUSINESS AS FISHER PEN CO., *v.* DURKIN, SECRETARY OF LABOR, *ante*, p. 897;

No. 384. LARSON ET AL. *v.* CITY OF LONG BEACH, *ante*, p. 890;

No. 393. TENNESSEE ET AL. *v.* UNITED STATES ET AL., *ante*, p. 891;

No. 403. LUNN *v.* F. W. WOOLWORTH CO., *ante*, p. 900; and

No. 416. REPSHOLDT *v.* UNITED STATES, *ante*, p. 901. Petitions for rehearing denied.

No. 343. AIKEN *v.* RICHARDSON, *ante*, p. 869. Second petition for rehearing denied.

No. 23, Misc. SHOTKIN *v.* ATCHISON, TOPEKA & SANTA FE R. CO. ET AL., *ante*, p. 860. Second petition for rehearing denied.

No. 42, Misc. SLACK *v.* UNITED STATES, *ante*, p. 888; and

No. 131, Misc. TATE *v.* CALIFORNIA, *ante*, p. 879. Petitions for rehearing denied.

JANUARY 11, 1954.

Per Curiam Decisions.

No. 300. BROWNELL, ATTORNEY GENERAL, *v.* RUBINSTEIN. Certiorari, 346 U. S. 870, to the United States Court of Appeals for the District of Columbia Circuit. Argued January 7–8, 1954. Decided January 11, 1954. *Per Curiam:* The judgment is affirmed by an equally divided Court. MR. JUSTICE CLARK took no part in the consideration or decision of this case. *Robert W. Ginnane* argued the cause for petitioner. With him on the brief were *Acting Solicitor General Stern, Assistant Attorney General Olney, Beatrice Rosenberg* and *J. F. Bishop. Edward J. Ennis* argued the cause for respondent. With him on the brief were *Jack Wasserman* and *Lemuel B. Schofield*. Reported below: 92 U. S. App. D. C. 328, 206 F. 2d 449.

No. 347. GIALLO ET AL. *v.* UNITED STATES. Certiorari, 346 U. S. 871, to the United States Court of Appeals for the Second Circuit. Argued January 8, 1954. Decided January 11, 1954. *Per Curiam:* Judgment affirmed. *Henry K. Chapman* argued the cause and filed a brief for petitioners. *John F. Davis* argued the cause for the United States. With him on the brief were *Acting Solicitor General Stern, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack*. Reported below: 206 F. 2d 207.

Miscellaneous Orders.

No. 115. KERN-LIMERICK, INC. ET AL. *v.* PARKER, COMMISSIONER OF REVENUES FOR ARKANSAS. Scurlock, present Commissioner of Revenues, substituted for Parker.

No. 423. BENTSEN ET AL. *v.* BLACKWELL ET AL. The application of the Solicitor General on behalf of the Se-

curities and Exchange Commission for leave to appear and present oral argument, as *amicus curiae*, is granted.

No. 178, Misc. Ex parte Sztwiertnia. The motion for leave to file petition for writ of habeas corpus is denied. Mr. Justice Black and Mr. Justice Douglas would grant leave to file. Leave to file not being granted, they would deny only without prejudice to petitioner's right to file a petition for writ of habeas corpus in the United States District Court. In either case they would appoint counsel to represent petitioner.

No. 250, Misc. Stephenson *v.* New Jersey et al. Motion for leave to file petition for writ of habeas corpus denied.

Probable Jurisdiction Noted.

No. 500. United States *v.* Dixon. Appeal from the United States District Court for the Northern District of Georgia. Probable jurisdiction noted. *Acting Solicitor General Stern* for the United States.

Certiorari Denied.

No. 154. Downing et al. *v.* Securities and Exchange Commission et al. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Joseph B. Hyman* and *John F. X. Finn* for petitioners. *Acting Solicitor General Davis, Roger S. Foster* and *Aaron Levy* for the Securities and Exchange Commission; and *Richard Joyce Smith* for the United Corporation, respondents. Reported below: 92 U. S. App. D. C. 172, 203 F. 2d 611.

No. 460. Chicago & North Western Railway Co. *v.* Davenport et al. C. A. 5th Cir. Certiorari denied.

Drennan J. Slater, Amos M. Mathews and *Arthur P. Bagby* for petitioner. *John J. McKay* for Hammill, respondent. Reported below: 205 F. 2d 589.

No. 474. COLBERT ET AL. *v.* BROTHERHOOD OF RAILROAD TRAINMEN ET AL. C. A. 9th Cir. Certiorari denied. *C. P. Von Herzen* for petitioners. *Clifton Hildebrand* for the Brotherhood of Railroad Trainmen et al., and *C. W. Cornell* and *Randolph Karr* for the Pacific Electric Railway Co., respondents. Reported below: 206 F. 2d 9.

No. 28, Misc. BEDNARIK *v.* ALVIS, WARDEN, ET AL. Petition for writ of certiorari to the Supreme Court of Ohio denied for the reason that the judgment below is based on state procedural grounds adequate to support it. Petitioner *pro se*. *C. William O'Neill*, Attorney General of Ohio, and *Thomas R. Lloyd*, Assistant Attorney General, for respondents. Reported below: 159 Ohio St. 596, 112 N. E. 2d 817.

No. 226, Misc. LEVY *v.* UNITED STATES. Court of Claims. Certiorari denied. Petitioner *pro se*. *Acting Solicitor General Stern, Assistant Attorney General Burger* and *Melvin Richter* for the United States. Reported below: 125 Ct. Cl. 145.

No. 244, Misc. HALL *v.* FLORIDA. Supreme Court of Florida. Certiorari denied. *George W. Scofield* and *Nathan R. Graham* for petitioner. Reported below: 66 So. 2d 863.

No. 253, Misc. NEWMAN *v.* SKEEN, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 269, Misc. KRELL *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 275, Misc. PARKER *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 276, Misc. HAMMACK *v.* RANDOLPH, WARDEN. Circuit Court of Randolph County, Illinois. Certiorari denied.

No. 277, Misc. SHEPPARD *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 415 Ill. 497, 114 N. E. 2d 564.

No. 282, Misc. JONES *v.* MAHONEY, WARDEN. Court of Common Pleas of Allegheny County, Pennsylvania. Certiorari denied.

JANUARY 18, 1954.

Per Curiam Decisions.

No. 128. COUNTY BOARD OF ARLINGTON COUNTY ET AL. *v.* STATE MILK COMMISSION. Appeal from the Supreme Court of Appeals of Virginia. Argued January 4, 1954. Decided January 18, 1954. *Per Curiam:* The judgment is affirmed. *Milk Control Board* v. *Eisenberg Farm Products*, 306 U. S. 346. MR. JUSTICE BLACK dissents. *Malcolm D. Miller* argued the cause and filed a brief for appellants. *Roger J. Whiteford* argued the cause for appellee. With him on the brief were *J. Lindsay Almond, Jr.*, Attorney General of Virginia, and *Thomas M. Miller*, Assistant Attorney General.

No. 435. NORTH *v.* FLORIDA. Certiorari, 346 U. S. 864, to the Supreme Court of Florida. Argued January 12, 1954. Decided January 18, 1954. *Per Curiam:* The judgment is affirmed. *Claude Pepper* argued the cause for petitioner. With him on the brief were *C. Jay Hardee* and *John R. Parkhill*. *Bart L. Cohen*, Assistant Attorney General of Florida, argued the cause for respondent.

With him on the brief were *Richard W. Ervin*, Attorney General, and *Reeves Bowen*, Assistant Attorney General. Reported below: 65 So. 2d 77.

No. 48. BUILDING TRADES COUNCIL ET AL. *v.* KINARD CONSTRUCTION CO. On petition for writ of certiorari to the Supreme Court of Alabama. *Per Curiam:* The petition for writ of certiorari is granted, and the judgment is reversed. *Garner* v. *Teamsters Union*, 346 U. S. 485. Since there has been no clear showing that respondent has applied to the National Labor Relations Board for appropriate relief, or that it would be futile to do so, the Court does not pass upon the question suggested by the opinion below of whether the state court could grant its own relief should the Board decline to exercise its jurisdiction. *Henry A. Bradshaw, J. Albert Woll, Herbert S. Thatcher* and *James A. Glenn* for petitioners. Reported below: 258 Ala. 500, 64 So. 2d 400.

Miscellaneous Orders.

No. —, Original. ALABAMA *v.* TEXAS ET AL.; and

No. —, Original. RHODE ISLAND *v.* LOUISIANA ET AL. These cases are set for hearing on the motions for leave to file the complaints. THE CHIEF JUSTICE took no part in the consideration or decision of this question. *Si Garrett*, Attorney General, and *M. Roland Nachman, Jr.* and *Gordon Madison*, Assistant Attorneys General, for the State of Alabama, complainant. *William E. Powers*, Attorney General, and *Thomas G. Corcoran* for the State of Rhode Island and Providence Plantations, complainant. *Attorney General Brownell, Acting Solicitor General Stern, Assistant Attorney General Rankin, Oscar H. Davis, John F. Davis* and *George S. Swarth* for Humphrey et al.; *John Ben Shepperd*, Attorney General, *Robert S. Trotti*, First Assistant Attorney General, and *Jesse P. Luton, Jr., William H. Holloway* and *Phillip Robinson*,

Assistant Attorneys General, for the State of Texas; *Fred S. LeBlanc*, Attorney General, *John L. Madden*, Assistant Attorney General, and *Bailey Walsh*, Special Assistant Attorney General, for the State of Louisiana; *Richard W. Ervin*, Attorney General, *Howard S. Bailey* and *Fred M. Burns*, Assistant Attorneys General, and *John D. Moriarty*, Special Assistant Attorney General, for the State of Florida; and *Edmund G. Brown*, Attorney General, *William V. O'Connor*, Chief Deputy Attorney General, *Everett W. Mattoon*, Assistant Attorney General, and *George G. Grover*, Deputy Attorney General, for the State of California, defendants.

No. 5, Original, October Term, 1950. NEW JERSEY *v.* NEW YORK ET AL. The answers of New Jersey and of Pennsylvania to the amended petition of the City of New York to modify the decree are received and they, along with the amended petition, are referred to the Special Master. *Theodore D. Parsons*, Attorney General, *Robert Peacock*, Deputy Attorney General, and *Kenneth H. Murray* for the State of New Jersey. *Frank F. Truscott*, Attorney General, *George G. Chandler*, *Bernard G. Segal*, *Wm. A. Schnader* and *Harry F. Stambaugh* for the State of Pennsylvania.

No. 280. PHILLIPS PETROLEUM CO. *v.* WISCONSIN ET AL.; and

No. 281. TEXAS ET AL. *v.* WISCONSIN ET AL. On petitions for rehearing and petitions for writs of certiorari to the United States Court of Appeals for the District of Columbia Circuit. Petitions for rehearing granted. The orders entered November 30, 1953, denying certiorari, 346 U. S. 896, are vacated and the petitions for writs of certiorari are granted. MR. JUSTICE BLACK dissents. The motion for leave to file brief of the Independent Petroleum Assn. et al., as *amici curiae*, is denied. *Rayburn L.*

Foster, *Harry D. Turner* and *Hugh B. Cox* for petitioner in No. 280. *John Ben Shepperd*, Attorney General, and *Charles E. Crenshaw*, Special Assistant Attorney General, for the State of Texas et al., *Mac Q. Williamson*, Attorney General, for the Corporation Commission of Oklahoma, and *Richard H. Robinson*, Attorney General, *George A. Graham*, Special Assistant Attorney General, and *L. C. White* for the State of New Mexico et al., petitioners in No. 281. A brief of *amici curiae* urging that the petitions be granted was filed on behalf of the States of Louisiana, by *Fred S. LeBlanc*, Attorney General; Colorado, by *Duke W. Dunbar*, Attorney General, and *Wilbur Rocchio*, Assistant Attorney General; Mississippi, by *J. P. Coleman*, Attorney General; North Dakota, by *E. T. Christianson*, Attorney General; Wyoming, by *Howard Black*, Attorney General; and the State Corporation Commission of Kansas, by *Jay Kyle*, General Counsel. Reported below: 92 U. S. App. D. C. 284, 205 F. 2d 706.

No. 418. Federal Power Commission *v.* Wisconsin et al. On petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. The order entered November 30, 1953, denying certiorari, 346 U. S. 896, is vacated and the petition for writ of certiorari is granted. Mr. Justice Black dissents. *Acting Solicitor General Stern* and *Willard W. Gatchell* for petitioner. *Vernon W. Thomson*, Attorney General, and *Stewart G. Honeck*, Deputy Attorney General, for the State of Wisconsin, *William E. Torkelson* for the Public Service Commission of Wisconsin, *David M. Proctor* and *Jerome M. Joffee* for Kansas City, Missouri, *James H. Lee* for Detroit, Michigan, and *Walter J. Mattison* and *Harry G. Slater* for Milwaukee, Wisconsin, respondents. Reported below: 92 U. S. App. D. C. 284, 205 F. 2d 706.

No. 265, Misc. Brooks *v.* Steele, Warden. Motion for leave to file petition for writ of habeas corpus denied.

Certiorari Granted. (*See also Nos. 48, 280, 281 and 418, supra.*)

No. 188. UNITED CONSTRUCTION WORKERS ET AL. *v.* LABURNUM CONSTRUCTION CORP. The petition for writ of certiorari to the Supreme Court of Appeals of Virginia is granted limited to the following question:

"In view of the type of conduct found by the Supreme Court of Appeals of Virginia to have been carried out by Petitioners, does the National Labor Relations Board have exclusive jurisdiction over the subject matter so as to preclude the State Court from hearing and determining the issues in a common-law tort action based upon this conduct?"

The Government is invited to submit a memorandum setting forth the policy of the National Labor Relations Board in regard to: (1) the proviso in § 10 (a), 61 Stat. 146, 29 U. S. C. (Supp. III) § 160 (a); and (2) other cases, apart from those in § 10 (a), in which the Board declines to exercise its statutory jurisdiction. The memorandum should indicate by what standards the Board declines to act and whether the standards are applied by rule or regulation or on a case-by-case method.

Welly K. Hopkins, Harrison Combs and *M. E. Boiarsky* for petitioners. *Archibald G. Robertson* and *George E. Allen* for respondent. Reported below: 194 Va. 872, 75 S. E. 2d 694.

No. 398. CAPITAL SERVICE, INC., DOING BUSINESS AS DANISH MAID BAKERY, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. The petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted limited to the following question:

"In view of the fact that exclusive jurisdiction over the subject matter was in the National Labor Relations Board (*Garner* v. *Teamsters Union*, 346 U. S. 485), could

the Federal District Court, on application of the Board, enjoin Petitioners from enforcing an injunction already obtained from the State Court?"

Carl M. Gould for petitioners. *Acting Solicitor General Stern, George J. Bott, David P. Findling, Dominick L. Manoli* and *Norton J. Come* filed a memorandum for respondent. Reported below: 204 F. 2d 848.

Certiorari Denied.

No. 475. L. Ronney & Sons Furniture Manufacturing Co. *v.* National Labor Relations Board. C. A. 9th Cir. Certiorari denied. *A. Andrew Hauk* for petitioner. *Acting Solicitor General Stern, George J. Bott, David P. Findling* and *Dominick L. Manoli* for respondent. Reported below: 206 F. 2d 730.

No. 477. Kohlberg *v.* Gray, Administrator of Veterans Affairs, et al. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Carl L. Shipley* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Burger* and *Samuel D. Slade* for respondents. Reported below: 93 U. S. App. D. C. —, 207 F. 2d 35.

No. 482. Harvey Radio Laboratories, Inc. *v.* United States. Court of Claims. Certiorari denied. *Bolling R. Powell, Jr.* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Burger, Melvin Richter* and *Lester S. Jayson* for the United States. Reported below: 126 Ct. Cl. 383, 115 F. Supp. 444.

No. 485. Food Fair Stores, Inc. *v.* Square Deal Market Co., Inc. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *H. Douglas Weaver* and *Donald E. Van Koughnet* for

petitioner. *Bernard Margolius, Joseph B. Danzansky* and *Carleton U. Edwards II* for respondent. Reported below: 93 U. S. App. D. C. —, 206 F. 2d 482.

No. 487. ANDERSON ET AL., DOING BUSINESS AS PACIFIC MOULDED PRODUCTS CO., *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. *Carl M. Gould* for petitioners. *Acting Solicitor General Stern, George J. Bott, David P. Findling* and *Dominick L. Manoli* for respondent. Reported below: 206 F. 2d 409.

No. 488. SPANG ET AL., DOING BUSINESS AS CUBE STEAK MACHINE CO., *v.* WATSON, COMMISSIONER OF PATENTS. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Cedric W. Porter* for petitioners. *Acting Solicitor General Stern, Assistant Attorney General Burger, Melvin Richter* and *Hubert H. Margolies* for respondent. Reported below: 92 U. S. App. D. C. 266, 205 F. 2d 703.

No. 489. TICKLE *v.* NORTH CAROLINA. Supreme Court of North Carolina. Certiorari denied. *Wm. Reid Dalton* for petitioner. *Harry McMullan,* Attorney General of North Carolina, and *Ralph Moody,* Assistant Attorney General, for respondent. Reported below: 238 N. C. 206, 77 S. E. 2d 632.

No. 491. WIREN *v.* PARAMOUNT PICTURES, INC. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Benjamin F. Pollack, James M. Landis* and *George J. Solomon* for petitioner. *William E. Leahy, Wm. J. Hughes, Jr.* and *Louis Phillips* for respondent. Reported below: 92 U. S. App. D. C. 347, 206 F. 2d 465.

No. 496. DIETRICH *v.* DIETRICH. Supreme Court of California. Certiorari denied. *Clark M. Clifford, Wil-*

liam H. Dorsey, Jr., Loyd Wright and *Charles A. Loring* for petitioner. *Frank B. Belcher* for respondent. Reported below: 41 Cal. 2d 497, 261 P. 2d 269.

No. 236, Misc. KEYS *v.* PENNSYLVANIA ET AL. Supreme Court of Pennsylvania, Eastern District. Certiorari denied.

No. 254, Misc. GARRAFFA *v.* NEW YORK. Appellate Division of the Supreme Court of New York, First Department. Certiorari denied.

No. 258, Misc. RUBINSTEIN *v.* RUBINSTEIN ET AL. Court of Appeals of New York. Certiorari denied. *John F. X. Finn* for petitioner. *George P. Halperin* for Rubinstein; *Joseph Glass* for Sztykgold et al.; and *Edwin B. Wolchok* for British American Equities, Inc. et al., respondents. Reported below: 306 N. Y. 598, 115 N. E. 2d 827.

No. 274, Misc. SWAIN *v.* TEETS, WARDEN. Supreme Court of California. Certiorari denied.

No. 283, Misc. SCHANDA *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 286, Misc. LAIR *v.* RANDOLPH, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 288, Misc. CURLEY *v.* WISCONSIN. Supreme Court of Wisconsin. Certiorari denied.

No. 294, Misc. APPICE *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 296, Misc. LILYROTH *v.* RAGEN, WARDEN. Circuit Court of Lee County, Illinois. Certiorari denied.

No. 298, Misc. ORRIE *v.* WISCONSIN ET AL. Supreme Court of Wisconsin. Certiorari denied.

No. 299, Misc. HAMMOND *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 1 Ill. 2d 65, 115 N. E. 2d 331.

No. 307, Misc. WALTERS *v.* IOWA. Supreme Court of Iowa. Certiorari denied.

Rehearing Granted. (*See Nos. 280 and 281, supra.*)

Rehearing Denied.

No. 364. INVESTORS ROYALTY CO., INC. *v.* MARKET TREND SURVEY, INC. ET AL., *ante*, p. 909;

No. 387. GALLAGHER, ADMINISTRATRIX, ET AL. *v.* UNITED STATES LINES CO. ET AL., *ante*, p. 897;

No. 426. GLOVER ET AL. *v.* MCFADDIN ET AL., *ante*, p. 900;

No. 432. MORAND BROTHERS BEVERAGE CO. ET AL. *v.* NATIONAL LABOR RELATIONS BOARD, *ante*, p. 909; and

No. 441. WESTERN PACIFIC RAILROAD CORP. ET AL. *v.* WESTERN PACIFIC RAILROAD CO. ET AL., *ante*, p. 910. Petitions for rehearing denied.

AMENDMENT TO RULE 37 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

MONDAY, APRIL 12, 1954.

ORDERED, That Rule 37 of the Federal Rules of Criminal Procedure be, and it hereby is, amended to read as follows:

"RULE 37. TAKING APPEAL; AND PETITION FOR WRIT OF CERTIORARI.

"(a) TAKING APPEAL TO A COURT OF APPEALS.

"(1) *Notice of Appeal.* An appeal permitted by law from a district court to a court of appeals is taken by filing with the clerk of the district court a notice of appeal in duplicate. Petitions for allowance of appeal, citations and assignments of error in cases governed by these rules are abolished. The notice of appeal shall set forth the title of the case, the name and address of the appellant and of appellant's attorney, a general statement of the offense, a concise statement of the judgment or order, giving its date and any sentence imposed, the place of confinement if the defendant is in custody and a statement that the appellant appeals from the judgment or order. The notice of appeal shall be signed by the appellant or appellant's attorney, or by the clerk if the notice is prepared by the clerk as provided in paragraph (2) of this subdivision. The duplicate notice of appeal and a statement of the docket entries shall be forwarded immediately by the clerk of the district court to the clerk of the court of appeals. Notification of the filing of the notice of appeal shall be given by the clerk by mailing copies thereof to adverse parties, but his failure so to do does not affect the validity of the appeal.

"(2) *Time for Taking Appeal.* An appeal by a defendant may be taken within 10 days after entry of the

judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion. When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant. An appeal by the government when authorized by statute may be taken within 30 days after entry of the judgment or order appealed from.

"(b) TAKING APPEAL TO THE SUPREME COURT.

"An appeal to the Supreme Court when authorized by statute shall be taken in the manner and within the time prescribed by its rules.

"(c) PETITION FOR REVIEW ON WRIT OF CERTIORARI.

"Petition to the Supreme Court for writ of certiorari shall be made in the manner and within the time prescribed by its rules."

That the foregoing amendment to the Federal Rules of Criminal Procedure shall take effect on July 1, 1954.

REVISED RULES

OF THE

SUPREME COURT OF THE UNITED STATES

Effective July 1, 1954

The following revision of the Rules of the Supreme Court of the United States was adopted by an order of the Court entered April 12, 1954. See *post*, page 945. They became effective on July 1, 1954, as provided in Rule 61, *post*, page 1010.

For the next preceding revision of the Rules of the Supreme Court and amendments thereto, see 306 U. S. 671; 309 U. S. 701; 311 U. S. 731; 313 U. S. 602; 316 U. S. 715; 318 U. S. 805; 319 U. S. 787; 322 U. S. 774; 329 U. S. 837; 332 U. S. 857; 334 U. S. 863; 335 U. S. 915; 338 U. S. 959; 339 U. S. 994, 995.

ORDER ADOPTING REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

MONDAY, APRIL 12, 1954.

The revision of the Rules of this Court has been this day lodged with the Clerk, and it is ordered that the said Rules shall become effective July 1, 1954, and be printed as an appendix to the United States Reports.

It is further ordered that the Rules promulgated February 13, 1939, appearing in volume 306 of the United States Reports, appendix, and all amendments thereof be and they hereby are rescinded, but this shall not affect any proper action taken under them before the Rules hereby adopted become effective.

A general idea of the Bar's appraisal of the needs and possibilities for changes in the form and content of the Rules was obtained from the following gentlemen:

Warner W. Gardner, Esq., of the District of Columbia Bar

Henry M. Hart, Esq., of Cambridge, Massachusetts, Professor of Law at Harvard University

Charles A. Horsky, Esq., of the District of Columbia Bar

James Wm. Moore, Esq., of New Haven, Connecticut, Professor of Law at Yale University

Robert L. Stern, Esq., of Washington, D. C., at the time Acting Solicitor General

Herbert Wechsler, Esq., of New York City, Professor of Law at Columbia University

Frederick Bernays Wiener, Esq., of the District of Columbia Bar

Harold B. Willey, Esq., Clerk of the Supreme Court of the United States.

The Court expresses its high appreciation of the services of all the gentlemen named. Their expert knowledge and painstaking collaboration have aided the Court in the formulation of Rules designed to promote the simplification of procedure in this Court.

Special mention must be made of the services of Mr. Wiener who, for more than a year, as Reporter to the Committee of the Court on the Revision of the Rules, devoted himself to the preparation of drafts for the Committee.

We acknowledge, also, our indebtedness to our Clerk, Mr. Willey, for the experience and skill he contributed to the work of draftsmanship.

The Court directs that this order be spread upon the Journal of the Court.

MR. JUSTICE BLACK:

The revised rules contain some changes made necessary by legislation, with which I am of course in accord. There are also a few other changes which I think represent desirable improvements. But I believe it would be far better to make these changes simply by amending the old rules rather than by adopting a whole new set. The old rules and our interpretations of them are familiar to the bar, and, according to my observation, work about as well as could be expected of any rules. The principal function of procedural rules should be to serve as useful guides to help, not hinder, persons who have a legal right to bring their problems before the courts. But new rules without settled meanings breed mistakes and controversies that frequently make the way of litigants unnecessarily perilous. Volumes of new Rules Decisions in recent years attest to this. Judicial statistics would show, I fear, an unfortunately large number of meritorious cases lost due to inadvertent failure of lawyers to conform to procedural prescriptions having little if any relevancy to substantial justice. So much for my general objection to frequent, sweeping rules revisions.

I particularly object to the present revision because a number of the changes put unnecessarily burdensome conditions and restrictions on rights of review and appeal Congress has provided. Our rules should make appellate review easier, not harder.

Finally, I have never favored the almost insuperable obstacles our rules put in the way of briefs sought to be filed by persons other than the actual litigants. Most of the cases before this Court involve matters that affect far more people than the immediate record parties. I think the public interest and judicial administration would be better served by relaxing rather than tightening the rule against *amicus curiae* briefs.

REVISED RULES

OF THE

SUPREME COURT OF THE UNITED STATES

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REVISED RULES
OF THE
SUPREME COURT OF THE UNITED STATES

ADOPTED APRIL 12, 1954. EFFECTIVE JULY 1, 1954.

PART I. THE COURT.

1.

CLERK.

1. The clerk of this court shall reside and keep the office at the seat of the National Government, and he shall not practice as attorney or counsellor in any court, while he continues in office.

2. The clerk shall not permit any original record or paper to be taken from the office, except temporarily for purposes of printing, and except, on proper application from counsel or from the clerk or the presiding judge of a court below whose judgment is sought to be reviewed, for return to such court, after the conclusion of the proceedings in this court. Original or file copies of pleadings, papers, or briefs may not be withdrawn by litigants.

3. The clerk's office will be open from 9:00 A. M. to 5:00 P. M. Mondays through Fridays, and from 9:00 A. M. to noon on Saturdays, legal holidays excepted.

2.

LIBRARY.

1. The library for the bar shall be open to members of the bar of this court, to members of Congress, and to law officers of the executive or other departments of the Government.

2. The library shall be open during such times as the reasonable needs of the bar require and shall be governed by the regulations made by the librarian with the approval of the chief justice.

3. Books may not be removed from the building.

3.

TERM.

1. The court will hold an annual term commencing on the first Monday in October of each year and may hold such adjourned or special terms as may be necessary.

2. The court will at every term announce the date after which no case will be called for argument, or be submitted for decision at that term, unless otherwise ordered for special cause shown.

3. At the end of each term, all cases on the docket shall be continued to the next term.

4.

SESSIONS, QUORUM, AND ADJOURNMENTS.

1. Open sessions of the court will be held at noon on the first Monday in October of each year, and thereafter as announced by the court. When the court is in session to hear arguments, it sits from noon until two; recesses until half-past two; and adjourns for the day at half-past four.

2. The court will not hear arguments or hold open sessions on Saturday.

3. In the absence of a quorum, on any day appointed for holding a session of the court, the justices attending (or, if no justice is present, the clerk or a deputy clerk) may adjourn the court until there is a quorum.

4. The court may, in appropriate instances, direct the clerk or the marshal to announce recesses and adjournments.

PART II. ATTORNEYS AND COUNSELLORS.

5.

ADMISSION TO THE BAR.

1. It shall be requisite to the admission of attorneys or counsellors to practice in this court, that they shall have been such for three years past in the highest court of a State, Territory, District, Commonwealth, or Possession, and that their private and professional characters shall appear to be good.

2. In advance of appearing for admission, each applicant shall file with the clerk (1) a certificate from the presiding judge or clerk of the proper court evidencing his admission to practice there and that he is presently in good standing, and (2) his personal statement, on the form approved by the court and furnished by the clerk, which shall be indorsed by two members of the bar of this court who are not related to the applicant.

3. Admissions will be granted only upon oral motion by a member of the bar in open court, and upon his assurance that he is satisfied that the applicant possesses the necessary qualifications.

4. Upon being admitted, each applicant shall take and subscribe the following oath or affirmation, viz:

I, ———————— ————————, do solemnly swear (or affirm) that I will demean myself, as an attorney and counsellor of this court, uprightly, and according to law; and that I will support the Constitution of the United States.

See Rule 52 (f) for fee required.

6.

ADMISSION OF FOREIGN COUNSEL.

An attorney, barrister, or advocate who is qualified to practice in the courts of any foreign state may be specially admitted to the bar of this court for purposes limited

to a particular case. He shall not, however, be authorized to act as attorney of record. In the case of such applicants, the oath shall not be required and there shall be no fee. Such admissions shall be only on motion of a member of the bar of this court, notice of which signed by such member and reciting all relevant facts shall be filed with the clerk at least three days prior to the motion.

7.

CLERKS TO JUSTICES NOT TO PRACTICE.

No one serving as a law clerk or secretary to a justice of this court shall practice as an attorney or counsellor in any court or before any agency of government while continuing in that position; nor shall he after separating from that position practice as an attorney or counsellor in this court until two years have elapsed after such separation; nor shall he ever participate, by way of any form of professional consultation and assistance, in any case that was pending in this court during the period that he held such position.

8.

DISBARMENT.

Where it is shown to the court that any member of its bar has been disbarred from practice in any State, Territory, District, Commonwealth, or Possession, or has been guilty of conduct unbecoming a member of the bar of this court, he will be forthwith suspended from practice before this court. He will thereupon be afforded the opportunity to show good cause, within forty days, why he should not be disbarred. Upon his response to the rule to show cause, or upon the expiration of the forty days if no response is made, the court will enter an appropriate order; but no order of disbarment will be entered except with the concurrence of a majority of the justices participating.

PART III. ORIGINAL JURISDICTION.

9.

PROCEDURE IN ORIGINAL ACTIONS.

1. This rule applies only to actions within the original jurisdiction of the court under the Constitution. Original applications for writs in aid of the court's appellate jurisdiction are governed by Part VII of these rules.

2. The form of pleadings and motions in original actions shall be governed, so far as may be, by the Federal Rules of Civil Procedure, and in other respects those rules, where their application is appropriate, may be taken as a guide to procedure in original actions in this court.

3. The initial pleading in any original action shall be prefaced by a motion for leave to file such pleading, and both shall be printed in conformity with Rule 39. A brief in support of the motion for leave to file, which shall comply with Rule 39, may be filed with the motion and pleading. Sixty copies of each document, with proof of service as prescribed by Rule 33, are required, except that, where the adverse party is a State, service shall be made on the governor and attorney general of such State.

4. The case will be placed upon the original docket when the motion for leave to file is filed with the clerk. The docket fee must be paid at that time, and the appearance of counsel for the plaintiff entered.

5. The adverse party or parties may, within sixty days after receipt of the motion for leave to file and allied documents, file sixty printed copies of a brief or briefs in opposition to such motion, which shall conform to Rule 39. When such brief or briefs in opposition have been filed, or the time within which they may be filed has expired, the motion, pleading and briefs shall be distributed to the court by the clerk. The court may

thereafter grant or deny the motion or set it down for argument.

6. Additional pleadings may be filed, and subsequent proceedings had, as the court shall direct.

7. Any process against a State issued from the court in an original action shall be served on the governor and attorney general of such State.

8. A summons issuing out of this court in any original action shall be served on the defendant sixty days before the return day set out therein; and if the defendant, on such service of the summons, shall not respond by the return day, the plaintiff shall be at liberty to proceed *ex parte*.

PART IV. JURISDICTION ON APPEAL.

10.

APPEAL—HOW TAKEN.

1. An appeal permitted by law to this court shall be taken by filing a notice of appeal, in the form and at the place prescribed by this rule.

2. The notice of appeal shall be in three parts: (a) It shall specify the party or parties taking the appeal; shall designate the judgment or part thereof appealed from, giving its date and the time of its entry; shall specify the statute under which the appeal to this court is taken; and, if in a criminal case, shall include a general statement of the offense, the sentence imposed, and the place of confinement if the defendant below is in custody. (b) It shall include a designation of the portions of the record to be certified by the clerk of the lower court to this court. (c) It shall set forth the questions presented by the appeal, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of the questions should be short and concise, should not be repetitious,

and should not resemble in form or particularity the former assignments of error which are abolished by paragraph 4 of this rule. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. Only the questions set forth in the notice of appeal or fairly comprised therein will be considered by the court. The notice of appeal shall include proof of service on all adverse parties as prescribed by Rule 33. A failure to comply with these requirements will be a sufficient reason for dismissing the appeal. For forms of notices of appeal, see the Appendix to these rules.

3. If the appeal is taken from a federal court, the notice of appeal shall be filed with the clerk of such court. If the appeal is taken from a state court, the notice of appeal shall be filed with the clerk of the court possessed of the record.

4. The petition for allowance of appeal, the order allowing appeal, the assignment of errors, the citation, and the bond for costs on appeal in cases governed by these rules are abolished.

11.

APPEAL—TIME FOR TAKING.

1. An appeal to review the judgment of a state court of last resort in a criminal case shall be deemed in time when the notice of appeal prescribed by Rule 10 is filed with the clerk of the court possessed of the record within ninety days after the entry of such judgment.

2. An appeal permitted by law from a district court to this court in a criminal case shall be in time when the notice of appeal prescribed by Rule 10 is filed with the clerk of the district court within thirty days after entry of the judgment or order appealed from.

3. An appeal in all other cases shall be in time when the notice of appeal prescribed by Rule 10 is filed with the clerk of the appropriate court within the time allowed by law for taking such appeal.

12.

CROSS-DESIGNATION AND CERTIFICATION OF RECORD.

1. Within twenty days from receipt of the notice of appeal, any other party to the appeal may file and serve a designation of additional portions of the record desired to be included. Such filing and service shall be made in the same manner as provided in Rule 10 for the filing and service of the notice of appeal. A judge of the court wherein the notice of appeal is filed (or a justice of this court, if application has first been made below) may, for good cause shown, enlarge the time for the filing of such cross-designation.

2. The clerk of the lower court shall prepare for transmission to this court as the transcript of the record only the portions of the record covered by the designation in the notice of appeal, and by the cross-designation, if any. He shall, however, include, whether designated or not, the opinion and judgment sought to be reviewed, and the notice of appeal. The papers comprising the transcript shall be fastened together in one or more volumes of convenient size, paged consecutively.

3. The parties or their counsel may by written stipulation filed with the clerk of the lower court within the time permitted for the filing of a cross-designation indicate the portions of the record to be included in the transcript, and the clerk shall then prepare for transmission only the parts designated in such stipulation, together with the opinion and judgment sought to be reviewed, and the notice of appeal, whether designated or not. If the designation in such stipulation shall differ from the designation in the notice of appeal, the designation in the stipulation shall prevail.

4. Whenever it shall be necessary or proper, in the opinion of the presiding judge of the court from which the appeal is taken, that original papers of any kind should be inspected in this court in lieu of copies, such

presiding judge may make such rule or order for the safe-keeping, transporting, and return of such original papers as to him may seem proper.

5. When more than one appeal is taken to this court from the same judgment, it shall be sufficient to prepare a single record containing all the matter designated or agreed upon by the parties, without duplication.

13.

DOCKETING CASES.

1. It shall be the duty of the appellant to docket the case and file the record thereof with the clerk of this court not more than sixty days after the filing of the notice of appeal. But, for good cause shown, any judge of the court whose decision is being appealed or in which the notice of appeal is filed (or a justice of this court if application has first been made below), may enlarge the time for docketing the case. Where application under this rule is made to a justice of this court, Rule 34 (2) governs timeliness. All other applications hereunder must be presented to the judge in question before the expiration of the original sixty-day period.

2. Upon the filing in this court of the record brought up by appeal, counsel for the appellant shall enter his appearance, pay the docket fee, and file, with proof of service as prescribed by Rule 33, forty copies of a printed statement as to jurisdiction, which shall comply in all respects with Rule 15. The case will then be placed on the appellate docket.

14.

DISMISSING APPEALS FOR NON-PROSECUTION.

1. After a notice of appeal has been filed, but before the case has been docketed in this court, the parties may at any time dismiss the appeal by stipulation filed in the court possessed of the record, or that court may dismiss

the appeal upon motion and notice by the appellant. For dismissal after the case has been docketed, see Rule 60.

2. If an appeal which has been noted is not docketed in this court within the time for docketing, plus any enlargement thereof duly granted, the court possessed of the record may dismiss the appeal upon motion of the appellee and notice to the appellant, and may make such orders thereon with respect to costs as may be just.

3. If an appeal which has been noted is not docketed in this court within the time for docketing, plus any enlargement thereof duly granted, and the court possessed of the record has for any reason denied an appellee's motion, made as provided in the foregoing paragraph, to dismiss the appeal, the appellee may have the cause docketed and the appeal dismissed in this court, by producing a certificate, whether in term or vacation, from the clerk of the court possessed of the record, establishing the foregoing facts, and by filing a motion to dismiss, which shall conform to Rule 35 and be accompanied by proof of service as prescribed by Rule 33. The clerk's certificate shall be attached to the motion, but it shall not be necessary for the appellee to file the record. In the event that the appeal is thereafter dismissed, the court will give judgment against the appellant and in favor of appellee for costs. In no case shall the appellant be entitled to docket the cause and file the record after the appeal shall have been dismissed under this paragraph, unless by special leave of court.

15.

JURISDICTIONAL STATEMENT.

1. The jurisdictional statement required by paragraph 2 of Rule 13 shall contain in the order here indicated—

(a) A reference to the official and unofficial reports of the opinions delivered in the courts below, if any, and

if reported. Any such opinions shall be appended as provided in subparagraph (h) hereof.

(b) A concise statement of the grounds on which the jurisdiction of this court is invoked, showing:

(i) The nature of the proceeding and the statute pursuant to which it is brought;

(ii) The date of the judgment or decree sought to be reviewed and the time of its entry, the date of any order respecting a rehearing, the date the notice of appeal was filed, and the court in which it was filed;

(iii) The statutory provision believed to confer on this court jurisdiction of the appeal;

(iv) Cases believed to sustain the jurisdiction.

(v) If the validity of the statute of a state, or statute or treaty of the United States is involved, its text shall be set out verbatim, citing the volume and page where it may be found in the official edition. If the statutory or treaty provisions that are involved are lengthy, the citation alone will suffice at this point, and their pertinent text shall be set forth in an appendix.

(c) (1) The questions presented by the appeal, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of the questions should be short and concise, should not be repetitious, and should not resemble in form or particularity the former assignments of error which are abolished by paragraph 4 of Rule 10. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. Only the questions set forth in the jurisdictional statement or fairly comprised therein will be considered by the court.

(2) The phrasing of the questions presented need not be identical with that set forth in the notice of appeal (see paragraph 2 of Rule 10), but the jurisdictional statement may not raise additional questions or change the substance of the questions already presented.

(d) A concise statement of the case containing the facts material to the consideration of the questions presented. If the appeal is from a state court, the statement of the case shall also specify the stage in the proceedings in the court of first instance, and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e. g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e. g., ruling on exception, portion of the court's charge and exception thereto, assignment of error) as will support the assertion that the rulings of the court were of a nature to bring the case within the statutory provision believed to confer jurisdiction on this court.

(e) If the appeal is from a state court, there shall be included a presentation of the grounds upon which it is contended that the federal questions are substantial (*Zucht* v. *King*, 260 U. S. 174, 176, 177), which shall show that the nature of the case and of the rulings of the court was such as to bring the case within the jurisdictional provisions relied on and the cases cited to sustain the jurisdiction (subparagraph (b)(iv) hereof), and shall include the reasons why the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

(f) If the appeal is from a federal court, there shall similarly be included a statement of the reasons why the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

(g) If the appeal is from a decree of a district court granting or denying an interlocutory injunction, the statement must also include a showing of the matters

in which it is contended that the court has abused its discretion by such action. See *United States* v. *Corrick*, 298 U. S. 435; *Maya* v. *Lakeland Highlands Canning Co.*, 309 U. S. 310.

(h) There shall be appended to the statement a copy of any opinions delivered upon the rendering of the judgment or decree sought to be reviewed, including, if not reported, earlier opinions in the same case, or opinions in companion cases, reference to which may be necessary to ascertain the grounds of the judgment or decree; and, if the appeal is from a federal court, there shall similarly be appended the court's findings of fact and conclusions of law, if any were separately made.

(i) If the appeal is from a state court, there shall also be appended to the statement a copy of the order, judgment, or decree appealed from; and if from a federal court, there shall similarly be appended a copy of such order, judgment, or decree, which may however be limited to the portions thereof appealed from.

2. The jurisdictional statement shall be printed in conformity with Rule 39.

3. Where several cases are appealed from the same court that involve identical or closely related questions, it shall suffice to file a single jurisdictional statement covering all the cases.

16.

MOTION TO DISMISS OR AFFIRM.

1. Within thirty days after receipt of the jurisdictional statement, the appellee may file a printed motion to dismiss, or motion to affirm. Where appropriate, a motion to affirm may be united in the alternative with a motion to dismiss.

(a) The court will receive a motion to dismiss any appeal on the ground that the appeal is not within the jurisdiction of this court, because not taken in conformity to statute or to these rules.

(b) The court will receive a motion to dismiss an appeal from a state court on the ground that it does not present a substantial federal question; or that the federal question sought to be reviewed was not timely or properly raised, or expressly passed on; or that the judgment rests on an adequate non-federal basis.

(c) The court will receive a motion to affirm the judgment sought to be reviewed on appeal from a federal court on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

2. The motion to dismiss or affirm shall be printed in conformity with Rules 35 and 39, and forty copies, with proof of service as prescribed by Rule 33, shall be filed with the clerk.

3. The appellant shall have twenty days from the date of receipt of the motion to dismiss or affirm within which to file a brief opposing the motion. Such brief shall be printed in conformity with Rule 39 and with the requirements of Rule 40 governing a respondent's brief, and forty copies, with proof of service as prescribed by Rule 33, shall be filed with the clerk. Upon the filing of such opposing brief, or the expiration of the time allowed therefor, or express waiver of the right to file, the jurisdictional statement, motion, and briefs thereon shall be distributed by the clerk to the court for its consideration. If no motion to dismiss or affirm has been filed, such distribution will similarly be made upon the expiration of the time to file such motion, or an express waiver of the right to do so.

4. After consideration of the papers distributed pursuant to the foregoing paragraph, the court will enter an appropriate order. If such order notes probable jurisdiction, or postpones consideration of the question of jurisdiction to the hearing of the case on the merits, the case shall stand for argument. If consideration of the

question of jurisdiction is postponed, counsel should address themselves, at the outset of their briefs and oral argument, to the question of jurisdiction.

17.

DESIGNATION OF PORTIONS OF THE RECORD TO BE PRINTED.

1. Within twenty days after the court has entered an order noting probable jurisdiction or postponing consideration of the question of jurisdiction to the hearing on the merits, the appellant shall file with the clerk a designation of the parts of the record the printing of which he thinks necessary for a consideration of the questions presented as set forth in his notice of appeal and his jurisdictional statement, or a designation of those parts the printing of which is considered unnecessary, whichever is more convenient, with proof of service on the appellee as prescribed by Rule 33.

2. Any appellee, within ten days after receipt of the designation as to printing required to be filed by appellant, may file with the clerk a cross-designation of additional parts of the record the printing of which he deems material; and, if he shall not do so, he shall be held to have consented to a hearing on a printed record consisting of the parts designated by the appellant. Such cross-designation shall be served as required by Rule 33. The parts of the record so designated by one or both of the parties, and only those parts, shall be printed by the clerk. The designations of the parts of the record to be printed will not be printed as a part of the record.

3. Within the time allowed for filing a cross-designation, the parties may stipulate the parts of the record to be printed, whereupon only the parts so stipulated shall be printed by the clerk. If the designation in such stipulation shall differ from the designation already filed by the appellant pursuant to paragraph 1 of this rule, then

the designation in the stipulation shall prevail. The stipulation will not be printed as a part of the record.

4. Rule 36 governs the printing and distribution of records.

18.

SUPERSEDEAS ON APPEAL.

1. Whenever an appellant entitled thereto desires a stay on appeal, he may present for approval to a judge of the court whose decision is sought to be reviewed, or to such court when action by that court is required by law, or, subject to paragraph 2 hereof, to a justice of this court, a motion to stay the enforcement of the judgment appealed from, with which, if the stay is to act as a supersedeas, shall be tendered a supersedeas bond which shall have such surety or sureties as said judge, court, or justice may require. The bond shall be conditioned for the satisfaction of the judgment in full together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest, and damages as this court may adjudge and award. When the judgment is for the recovery of money not otherwise secured, the amount of the bond shall be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs on the appeal, interest, and damages for delay, unless the judge, court, or justice after notice and hearing and for good cause shown fixes a different amount or orders security other than the bond. When the judgment determines the disposition of the property in controversy as in real actions, replevin, and actions to foreclose mortgages or when such property is in the custody of the marshal or when the proceeds of such property or a bond for its value is in the custody or control of any court wherein were had the proceedings appealed from, the amount of the supersedeas bond shall be fixed at such

sum only as will secure the amount recovered for the use and detention of the property, the costs of the action, costs on appeal, interest, and damages for delay.

2. Application hereunder to a justice of this court will normally not be entertained unless application therefor has first been made to a judge of the court rendering the decision appealed from, or to such court, or unless the security offered below has been disapproved by such judge or court. All such applications are governed by Rules 50 and 51.

PART V. JURISDICTION ON WRIT OF CERTIORARI.

19.

CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI.

1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a depar-

ture by a lower court, as to call for an exercise of this court's power of supervision.

2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, or of any other court whose determinations are by law reviewable on writ of certiorari.

20.

CERTIORARI TO A COURT OF APPEALS BEFORE JUDGMENT.

A writ of certiorari to review a case pending in a court of appeals, before judgment is given in such court, will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court. See *United States* v. *Bankers Trust Co.*, 294 U. S. 240; *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330; *Rickert Rice Mills* v. *Fontenot*, 297 U. S. 110; *Carter* v. *Carter Coal Co.*, 298 U. S. 238; *Ex parte Quirin*, 317 U. S. 1; *United States* v. *United Mine Workers*, 330 U. S. 258; *Youngstown Co.* v. *Sawyer*, 343 U. S. 579.

21.

REVIEW ON CERTIORARI—HOW SOUGHT.

1. Review on writ of certiorari shall be sought by filing with the clerk, with proof of service as required by Rule 33, forty printed copies of a petition, which shall conform in all respects to Rule 23, and a transcript of the record in the case, including the proceedings in the court whose judgment or decree is sought to be reviewed, which shall be certified by the clerk of the appropriate court or courts below. The provisions of Rule 12 (4) with respect to original papers shall apply to all cases sought to be reviewed on writ of certiorari. Service of a copy of the transcript of the record is not required.

2. Upon the filing of the petition and the certified transcript of record required by the preceding paragraph, counsel for the petitioner shall enter his appearance and pay the docket fee. The case will then be placed on the appellate docket. It shall be the duty of counsel for the petitioner to notify all respondents, on a form supplied by the clerk, of the date of filing and of the docket number of the case, and to indicate thereon the contents of the record filed under this rule, either itemized in detail as in a designation of record, or else appropriately summarized (e. g., "Joint Appendix as printed for the use of the court below"). Such notification shall be served as required by Rule 33.

3. The requirement of paragraph 1 with respect to the filing of a transcript of the record shall be deemed satisfied if the petitioner seeking review of the judgment or decree of a court of appeals whose rules permit the use of an appendix record on appeal, under the authority conferred by Rule 75 (l) of the Federal Rules of Civil Procedure (or of the judgment or decree of a state court which follows a similar practice), files a copy of the appendices filed by all parties below, or of the joint appendix if there be one, together with all the proceedings in the court below, the whole to be duly certified. In such cases, the petitioner may, at the time of filing his petition (or, if the petition for writ of certiorari is granted, then or before the time that his designation of portions of the record to be printed is due under paragraph 1 of Rule 26), file the entire record in addition to the appendix or appendices.

4. If the record in the case has been printed for the use of the court below, then the petitioner may at his option file, in addition to the certified record required by paragraph 1 of this rule, nine additional copies of the record so printed for consideration by the court. Similarly, if the record in the case has been printed for the

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use of the court below, and the petitioner does not so elect, any respondent may, if he desires, file nine copies of the record so printed at or before the time that his opposing brief is due under Rule 24. The provisions of paragraph 3 of this rule are applicable to the extra copies of the record furnished under this paragraph.

5. A party seeking a cross-writ of certiorari to review in this court the same judgment need not file any record additional to that filed by the petitioner.

6. Any respondent, including a cross-petitioner, may, within the time allowed for filing his brief in opposition or his cross-petition, file duly certified portions of the record additional to those filed by the petitioner.

7. The court may, on its own motion or that of a party, require the printing of the entire record, or of designated portions thereof, prior to ruling on the petition for writ of certiorari. If the petition is thereafter denied, the cost of such printing shall be taxed against the petitioner, unless otherwise ordered by the court; if the petition is thereafter granted, the cost of such printing shall abide the outcome of the case.

22.

REVIEW ON CERTIORARI—TIME FOR PETITIONING.

1. A petition for writ of certiorari to review the judgment of a state court of last resort in a criminal case shall be deemed in time when it and the certified record required by Rule 21 are filed with the clerk within ninety days after the entry of such judgment. A justice of this court, for good cause shown, may extend the time for applying for a writ of certiorari in such cases for a period not exceeding sixty days.

2. A petition for writ of certiorari to review the judgment of a court of appeals in a criminal case shall be deemed in time when it and the certified record required by Rule 21 are filed with the clerk within thirty days after the entry of such judgment. A justice of this court, for

good cause shown, may extend the time for applying for a writ of certiorari in such cases for a period not exceeding thirty days. If the original judgment in such a case was entered in a district court in Alaska, Guam, Hawaii, Puerto Rico, the Virgin Islands, or the Canal Zone, the petition and certified record shall be deemed filed in time if mailed by air-mail under a postmark dated within the thirty-day period or due extension thereof.

3. A petition for writ of certiorari in all other cases shall be deemed in time when it and the certified record required by Rule 21 are filed with the clerk within the time prescribed by law.

4. An application for extension of time within which to file a petition for writ of certiorari must set out, as in a petition for certiorari (see Rule 23 (1), subparagraphs (b) and (f)), the grounds on which the jurisdiction of this court is invoked, must identify the judgment sought to be reviewed and have appended thereto a copy of the opinion, and must set forth with specificity the reasons why the granting of an extension of time is deemed justified. For the time and manner of presenting an application for extension of time within which to file a petition for writ of certiorari, see Rules 34, 35 (2), and 50. Such applications are not favored.

23.

THE PETITION FOR CERTIORARI.

1. The petition for writ of certiorari shall contain in the order here indicated—

(a) A reference to the official and unofficial reports of the opinions delivered in the courts below, if any, and if reported. Any such opinions shall be appended as provided in subparagraph (i) hereof.

(b) A concise statement of the grounds on which the jurisdiction of this court is invoked, showing

(i) The date of the judgment or decree sought to be reviewed, and the time of its entry;

(ii) The date of any order respecting a rehearing, and the date and terms of any order granting an extension of time within which to petition for certiorari; and

(iii) The statutory provision believed to confer on this court jurisdiction to review the judgment or decree in question by writ of certiorari.

(c) The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. Only the questions set forth in the petition or fairly comprised therein will be considered by the court.

(d) The constitutional provisions, treaties, statutes, ordinances, or regulations which the case involves, setting them out verbatim, and citing the volume and page where they may be found in the official edition. If the provisions involved are lengthy, their citation alone will suffice at this point, and their pertinent text shall be set forth in an appendix.

(e) A concise statement of the case containing the facts material to the consideration of the questions presented.

(f) If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e. g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e. g., ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to

give this court jurisdiction to review the judgment on writ of certiorari.

Where the portions of the record relied upon under this subparagraph are voluminous, and the petitioner has not filed with his petition nine copies of the record as printed for the use of the court below, under the provisions of paragraph 4 of Rule 21, then those portions of the record shall be included in an appendix to the petition, which may, if more convenient, be separately presented.

(g) If review of the judgment of a federal court is sought, the statement of the case shall also show the basis for federal jurisdiction in the court of first instance.

(h) A direct and concise argument amplifying the reasons relied on for the allowance of the writ. See Rule 19.

(i) There shall be appended to the petition a copy of any opinions delivered upon the rendering of the judgment or decree sought to be reviewed, including all opinions of courts or administrative agencies in the case, and, if reference thereto is necessary to ascertain the grounds of the judgment or decree, opinions in companion cases.

Where the petitioner has filed with his petition nine copies of the record as printed for the use of the court below, under the provisions of paragraph 4 of Rule 21, then only the pertinent opinions not contained therein need be appended to the petition. If whatever is required by this paragraph to be appended to the petition is voluminous, it may, if more convenient, be separately presented.

(j) If review of the judgment or decree of a state court is sought, there shall also be appended to the petition a copy of the judgment or decree in question; and, if review of the judgment or decree of a federal court is sought, there shall similarly be appended a copy of such judgment or decree, which may however be limited to the portions thereof sought to be reviewed.

2. The petition for writ of certiorari shall be printed in conformity with Rule 39.

3. All contentions in support of a petition for writ of certiorari shall be set forth in the body of the petition, as provided in subparagraph (h) of paragraph 1 of this rule. No separate brief in support of a petition for writ of certiorari will be received, and the clerk will refuse to file any petition for writ of certiorari to which is annexed or appended any supporting brief.

4. The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition.

5. Where several cases are sought to be reviewed on certiorari to the same court that involve identical or closely related questions, it shall suffice to file a single petition for writ of certiorari covering all the cases.

24.

BRIEF IN OPPOSITION—REPLY.

1. Counsel for the respondent shall have thirty days (unless enlarged by the court or a justice thereof, or by the clerk under the provisions of paragraph 5 of Rule 34), after receipt of a petition, within which to file forty printed copies of an opposing brief disclosing any matter or ground why the cause should not be reviewed by this court. See Rule 19. Such brief in opposition shall comply with Rule 39 and with the requirements of Rule 40 governing a respondent's brief, and shall be served as prescribed by Rule 33.

2. No motion by a respondent to dismiss a petition for writ of certiorari will be received. Objections to the jurisdiction of the court to grant writs of certiorari may be included in briefs in opposition to petitions therefor.

3. Upon the expiration of the period for filing the respondent's brief, or upon an express waiver of the right

to file or the actual filing of such brief in a shorter time, the petition, and the record and brief, if any, shall be distributed by the clerk to the court for its consideration.

4. Timely reply or supplemental briefs will be considered, but distribution under paragraph 3 hereof will not be delayed pending the filing of such briefs.

25.

ORDER GRANTING OR DENYING CERTIORARI.

1. Whenever a petition for writ of certiorari to review a decision of any court is granted, the clerk shall enter an order to that effect, and shall forthwith notify the court below and counsel of record of the granting of the petition. The order shall direct that the certified transcript of record on file here be treated as though sent up in response to a formal writ. A formal writ shall not issue unless specially directed.

2. No mandate issues upon the denial of a petition for writ of certiorari. Whenever application for a writ of certiorari to review a decision of any court is denied, the clerk shall enter an order to that effect, and shall forthwith notify the court below and counsel of record. Such notification will not be withheld pending disposition of a petition for rehearing except by order of the court or of a justice thereof.

26.

DESIGNATION OF PORTIONS OF THE RECORD TO BE PRINTED.

1. Within twenty days after the court has entered an order granting a writ of certiorari, the petitioner shall file with the clerk a designation of the parts of the record the printing of which he thinks necessary for a consideration of the questions presented as set forth in his petition for writ of certiorari, or a designation of those parts the printing of which is considered unnecessary, which-

ever is more convenient, with proof of service on the respondent as prescribed by Rule 33. Insofar as any portion of the record has already been printed for the use of the court below, the designation shall so state, and shall indicate the number of printed copies of such portions that have been or can be furnished.

2. Any respondent, within ten days after receipt of the designation filed by the petitioner, may file with the clerk a cross-designation of additional parts of the record the printing of which he deems material; and, if he shall not do so, he shall be held to have consented to a hearing on a printed record consisting of the parts designated by the petitioner. The parts of the record so designated by one or both of the parties, and only those parts, shall be printed by the clerk. The designations of the parts of the record to be printed will not be printed by the clerk with the record.

3. Within the time allowed for filing a cross-designation, the parties may stipulate the parts of the record to be printed, whereupon only the parts so stipulated shall be printed by the clerk. If the designation in such stipulation shall differ from the designation already filed by the petitioner pursuant to paragraph 1 of this rule, then the designation in the stipulation shall prevail. The parties may also stipulate the inclusion in the printed record in this court of additional certified portions of the record below. The stipulations will not be printed as a part of the record.

4. Rule 36 governs the printing and distribution of records.

5. A motion to require the certification of additional parts of the record must be filed and served together with, and within the time allowed for filing, the cross-designation provided for in paragraph 2 of this rule. The clerk will not proceed under Rule 36 until the court has disposed of the motion.

27.

STAY PENDING REVIEW ON CERTIORARI.

Applications pursuant to 28 U. S. C. § 2101 (f) to a justice of this court will normally not be entertained unless application for a stay has first been made to a judge of the court rendering the decision sought to be reviewed, or to such court, or unless the security offered below has been disapproved by such judge or court. All such applications are governed by Rules 50 and 51.

PART VI. JURISDICTION OF CERTIFIED QUESTIONS.

28.

QUESTIONS CERTIFIED BY A COURT OF APPEALS OR BY THE COURT OF CLAIMS.

1. Where a court of appeals or the Court of Claims shall certify to this court a question or proposition of law, concerning which it desires instruction for the proper decision of a cause, the certificate shall contain a statement of the nature of the cause and of the facts on which such question or proposition of law arises. Questions of fact cannot be certified. Only questions or propositions of law may be certified, and they must be distinct and definite.

2. If in a cause certified by a court of appeals it appears that there is special reason therefor, this court may on application, or on its own motion, require that the entire record be sent up, so that it may consider and decide the entire matter in controversy.

3. Where application is made under the preceding paragraph for direction that the entire record be sent up, the application must be accompanied by a certified copy thereof.

29.

PROCEDURE IN CERTIFIED CASES.

1. When a case is certified, the certificate itself constitutes the record. The clerk will upon receipt thereof from the court below notify the appellant in the court of appeals, or the plaintiff in the Court of Claims, who shall thereupon pay the docket fee, after which the case will be placed on the appellate docket. If the appellant or plaintiff fails to pay the fee, the appellee or defendant may do so. The appearance of counsel for the party paying the fee shall be entered at the time of payment.

2. After docketing, the certificate shall be submitted to the court for a preliminary examination to determine whether the case shall be set for argument or whether the certificate will be dismissed.

3. If the case is ordered set down for argument, the clerk will notify the appellant or plaintiff to deposit the estimated cost of printing the certificate.

4. When the entire record is ordered to be sent up pursuant to Rule 28 (2), it will be printed under the supervision of the clerk as provided in Rule 36. If forty copies of the entire record as printed for the use of the court of appeals can be supplied by the appellant, the clerk will print only the certificate, otherwise the appellant will be required to deposit the estimated cost of printing as provided by paragraph 1 of Rule 36. The parties may, within fifteen days after the case is ordered set for argument, stipulate that portions of the certified record need not be printed.

5. Briefs on the merits in cases on certificates shall comply with Rules 39, 40, and 41, except that the brief of the party who was appellant or plaintiff below shall be filed within thirty days after receipt of the printed certificate or of the whole record if there be one, or within forty-five days of the order setting the case down for argument, whichever is later. Where, however, a case

is placed on the calendar too late in the term to be reached for argument before the commencement of the next term, the clerk will so notify the parties. In that event, counsel for the appellant or plaintiff below need not file the required number of copies of his brief prior to August 25.

PART VII. JURISDICTION TO ISSUE EXTRAORDINARY WRITS.

30.

CONSIDERATIONS GOVERNING ISSUANCE OF EXTRAORDINARY WRITS.

The issuance by the court of any writ authorized by 28 U. S. C. § 1651 (a) is not a matter of right but of sound discretion sparingly exercised. See the following cases, which are cited by way of illustration only: *Ex parte Bollman and Swartwout*, 4 Cranch 15; *Ex parte Peru*, 318 U. S. 578; *Ex parte Abernathy*, 320 U. S. 219; *Ex parte Hawk*, 321 U. S. 114; *House* v. *Mayo*, 324 U. S. 42; *U. S. Alkali Export Assn.* v. *United States*, 325 U. S. 196; *DeBeers Consol. Mines* v. *United States*, 325 U. S. 212; *Ex parte Betz*, 329 U. S. 672; *Ex parte Fahey*, 332 U. S. 258.

31.

PROCEDURE ON APPLICATIONS FOR EXTRAORDINARY WRITS.

1. The petition in any proceeding seeking the issuance of a writ by this court authorized by 28 U. S. C. § 1651 (a) or 28 U. S. C. § 2241 shall be prefaced by a motion for leave to file such petition, and both shall be printed. All contentions in support of the petition shall be included in the petition. The case will be placed upon the miscellaneous docket when forty copies of the printed papers, with proof of service as prescribed by Rule 33 (subject to paragraph 5 of this rule), are filed with the clerk and

the docket fee is paid. The appearance of counsel for the petitioner must be entered at this time.

2. If the petition seeks issuance of a common law writ of certiorari under 28 U. S. C. § 1651 (a), there must also be filed, at the time of docketing, a certified copy of the record, including all proceedings in the court to which the writ is sought to be directed. The petition shall, except for the addition of the motion for leave to file, follow as far as may be the form for a petition for certiorari prescribed by Rule 23, and shall set forth with particularity why the relief sought is not available in any other court, or cannot be had through other appellate processes. The respondent may, within thirty days after receipt of the motion and petition, file forty printed copies of a brief in opposition, as provided in Rule 24.

3. If the petition seeks issuance of a writ of prohibition, a writ of mandamus, or both in the alternative, it shall set forth with particularity why the relief sought is not available in any other court, and there shall be appended to such petition a copy of the judgment or order in respect of which the writ is sought, including a copy of any opinion rendered in that connection, and such other papers as may be essential to an understanding of the petition. The petition shall follow, insofar as applicable, the form for the petition for writ of certiorari prescribed by Rule 23. The motion and petition shall be served on the judge or judges to whom the writ is sought to be directed, and shall also be served on every other party to the proceeding in respect of which relief is desired. The judge or judges, and the other parties, may, within thirty days after receipt of the motion and petition, file forty printed copies of a brief or briefs in opposition thereto, with proof of service. If the judge or judges concerned do not desire to contest the motion and petition, they may so advise the clerk and all parties by letter. All parties, other than the judge or judges, who are served pursuant to

this paragraph, shall also be deemed to be respondents for all purposes in the proceeding in this court.

4. When briefs in opposition under paragraphs 2 and 3 of this rule have been filed, or when the time within which they may be filed has expired, or upon an express waiver of the right to file, the motion, petition, and briefs shall be distributed to the court by the clerk.

5. If the petition seeks issuance of an original writ of habeas corpus, it shall comply with the requirements of 28 U. S. C. § 2242, and in particular with the last paragraph thereof; and, if the relief sought is from the judgment of a state court, shall specifically set forth how and wherein the petitioner has exhausted his remedies in the state courts. See *Ex parte Abernathy*, 320 U. S. 219; *Ex parte Hawk*, 321 U. S. 114. Proceedings under this paragraph will be *ex parte*, unless the court requires the respondent to show cause why leave to file the petition for a writ of habeas corpus should not be granted. Neither refusal of leave to file, without more, nor an order of transfer under authority of 28 U. S. C. § 2241 (b), is an adjudication on the merits, and the former action is to be taken as without prejudice to a further application to any other court for the relief sought.

6. If the court orders the cause set down for argument, the clerk will notify the parties whether additional briefs are required, when they must be filed, how much time has been allotted for oral argument, and, if the case involves a petition for common law certiorari, that the parties shall proceed to designate the record pursuant to Rule 26.

32.

CERTIORARI TO CORRECT DIMINUTION OF RECORD ABOLISHED.

The writ of certiorari to correct diminution of the record is abolished. Relief formerly obtained by grant of that writ shall be sought by a motion to require certification of additional portions of the record. See Rules 26 (5) and 36 (6).

PART VIII. PRACTICE.

33.

SERVICE.

1. Whenever any pleading, motion, notice, brief or other document is required by these rules to be served, such service may be made personally or by mail on each adverse party. If personal, it shall consist of delivery, at the office of counsel of record, to counsel or a clerk therein. If by mail, it shall consist of depositing the same in a United States post office or mail box, with first class postage prepaid, addressed to counsel of record at his post office address. Where the person on whom service is to be made resides 500 miles or more from the person effecting service, such mailing must be made with air mail postage prepaid.

2. If the United States or an officer or agency thereof is a party, service of all briefs, pleadings, notices and papers shall, notwithstanding the foregoing paragraph, be made upon the Solicitor General, Department of Justice, Washington 25, D. C. Copies of the following documents shall also be served on an attorney of record who represented the United States or its officer or agency in the court whose judgment or decree is sought to be reviewed: Notice of appeal (Rule 10), cross-designation of record on appeal (Rule 12), petition for certiorari (Rule 21), motion for leave to file petition for common law certiorari (Rule 31 (2)). Where an agency of the United States authorized by law to appear in its own behalf is a party in addition to the United States, such agency shall also be served, in addition to the Solicitor General, in every case.

3. Whenever proof of service is required by these rules, it may be shown, either by indorsement on the document served or by separate instrument, by any one of the methods set forth below; and it is not necessary that

service on each party required to be served be effected in the same manner or evidenced by the same proof:

(a) By an acknowledgement of service of the document in question, signed by counsel of record for the party served.

(b) By a certificate of service of the document in question, reciting the fact and circumstances of service in compliance with the appropriate paragraph of this rule, such certificate to be signed by a member of the bar of this court representing the party in behalf of whom such service has been effected. If counsel certifying to such service has not up to that time entered his appearance in this court in respect of the cause in which such service is made, his appearance shall accompany the certificate of service if the same is to be filed in this court.

(c) By an affidavit of service of the document in question, reciting the fact and circumstances of service in compliance with the appropriate paragraph of this rule, whenever such service is effected by any person not a member of the bar of this court.

4. Whenever proof of service is required by these rules, it must accompany or be indorsed upon the document in question at the time such document is presented to the clerk for filing. Any document filed with the clerk by or on behalf of counsel of record whose appearance has not previously been entered must be accompanied by an entry of appearance.

34.

COMPUTATION AND ENLARGEMENT OF TIME.

1. In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Sunday or a legal holiday, in which event the period runs until the

end of the next day which is neither a Sunday nor a holiday. A half holiday shall be considered as other days and not as a holiday.

2. Whenever any justice of this court is empowered by law or under any provision of these rules to extend the time within which a party may petition for a writ of certiorari or file in this court his record on appeal or any brief or paper, an application seeking such extension shall be timely if it is presented to the clerk within the period sought to be extended. The clerk will refuse to receive any application for extension sought to be presented after expiration of such period.

3. All applications seeking an extension of time within which a party may petition for a writ of certiorari or file in this court his record on appeal or any brief or paper must be presented as provided in Rule 50, but such applications for extension of time, if once denied, may not be renewed before another justice after expiration of the period sought to be extended.

4. Whenever a justice has granted an extension of time within which a party may petition for a writ of certiorari or file in this court his record on appeal or any brief or paper it shall be the duty of the party to whom such extension is granted to give all other parties to the proceeding prompt notice thereof.

5. Whenever any party seeks an extension of time for filing briefs, and the granting of such extension is agreed to by all adverse parties and, in the opinion of the clerk, would not prejudicially delay the disposition of causes not set for argument or impede the progress of the argument calendar, the clerk may without further reference to the court enter an order granting the whole or any appropriate part of such extension of time. He shall notify all parties of the extension granted. All other requests for extension of time for filing briefs shall be referred to the court or a justice thereof.

35.

MOTIONS.

1. Every motion to the court shall state clearly its object and the facts on which it is based. A brief in support of the motion (other than motions under Rule 31) may be filed therewith.

2. Motions and applications addressed to a single justice need not be printed, and only a typewritten original need be filed. Motions in actions within the court's original jurisdiction shall be printed, and sixty copies shall be filed. Motions to dismiss or affirm made under Rule 16, motions to bring up the entire record under Rule 28 (2), motions for permission to file a brief *amicus curiae*, any motions the granting of which would be dispositive of the entire case or would affect the final judgment to be entered (other than a motion to docket or dismiss under Rule 14, or a motion for voluntary dismissal under Rule 60), and any motions to the court accompanied by a supporting brief, shall likewise be printed, and forty copies of the motion and of the brief, if any, shall be filed. All other motions to the court need not be printed, and it shall be sufficient to file a typewritten original and nine legible typewritten copies; but the court may by subsequent order require any such motion to be printed by the moving party.

3. Motions to the court shall be filed with the clerk, with proof of service unless *ex parte* in nature. For applications and motions addressed to a single justice, see Rule 50. No motion shall be presented in open court, other than a motion for admission to the bar, except when the proceeding to which it refers is being argued. Oral argument will not be heard on any motion unless the court specially assigns it therefor.

4. Unless a different time for the filing of a brief in opposition is specifically authorized elsewhere in these rules, motions submitted in printed form will normally

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be held by the clerk for twenty days to permit the filing of forty printed copies of a brief in opposition, after which the motion and brief will be distributed to the court. Motions to the court submitted in typewritten form may be opposed in like fashion, but distribution of the motion will be made at the earliest opportunity without regard to time of service. Where such motions are thereafter ordered to be printed, the parties will be notified of such order, and will be given a reasonable time within which to file forty printed copies of the motion and of the brief in opposition, if any.

5. Printed motions must comply with Rule 39 with respect to format, signatures, and index. Typewritten motions must similarly comply with Rule 47.

36.

PRINTING OF RECORDS.

1. Immediately after the designation and cross-designation, or the stipulation, of the parts of the record to be printed have been filed, or after the expiration of the time allowed for filing a cross-designation (see Rules 17 (2) and 26 (2)), the clerk shall make an estimate of the cost of printing the record and of his fee for preparing it for the printer and supervising the printing, and shall furnish the same to the appellant or petitioner. If such estimated sum be not paid on or before a date designated by the clerk in each case, it shall be the duty of the clerk to report that fact to the court, whereupon the cause will be dismissed, unless good cause to the contrary is shown.

2. If the actual cost of printing the record, together with the fees of the clerk, shall be less than the amount estimated and paid, the difference shall be refunded by the clerk to the appellant or petitioner. If the actual cost and clerk's fees shall exceed the estimate, the excess shall be paid to the clerk within forty days after notice thereof, and if it be not paid the matter shall be dealt with as if it were a default under paragraph 1 of this rule.

as well as by rendering a judgment against the defaulting party for such excess.

3. Upon payment of the amount estimated by the clerk, forty copies of the record shall be printed for the use of the court and of counsel. But where the record has been printed for the use of the court below, and forty copies as so printed are furnished and comply with the rules of this court, it shall not be necessary to reprint the record for this court, but only to print such additions as may be necessary to show the proceedings in the court below and the opinions there.

4. When printed copies of the record used in the court below have been furnished as permitted by Rule 21 (4), the requisite additional copies must be supplied after the portions of the record to be printed have been designated, and if not available the entire record as designated must be reprinted under the supervision of the clerk.

5. In preparing the record for the printer, the clerk shall omit all duplication, all repetition of titles and all other obviously unimportant matter, and make proper note thereof. He shall supervise the printing and see that the printed copy is properly indexed. He shall distribute the printed copies to the justices and the reporter of decisions, from time to time, as required, and five copies to each side. He shall also make such further distribution of printed records, briefs, and motions, as the court may from time to time direct.

6. If anything material to either party is omitted from the printed record by error or accident or is misstated therein, the parties by stipulation, or by motion to require the certification of additional parts of the record to be printed, may correct the omission or misstatement, provided that such stipulation or motion be filed within a reasonable time after the record is distributed to counsel pursuant to the preceding paragraph.

7. If either party shall have caused unnecessary parts of the record to be printed, or if it is shown that unnec-

essary parts of the record have been printed although a reasonable effort was made by one of the parties to secure the printing of a proper record, such order as to costs may be made as the court shall deem proper.

8. The fees of the clerk under Rule 52 shall be computed on the folios in the record as printed, and shall be in full for the performance of his duties in that regard.

9. The cost of printing the record and the clerk's fees in connection therewith shall be charged to the party against whom costs are taxed (see Rule 57).

37.

TRANSLATIONS.

Whenever any record transmitted to this court shall contain any document, paper, testimony, or other proceedings in a foreign language, without a translation of such document, paper, testimony, or other proceedings, made under the authority of the lower court, or admitted to be correct, the case shall be reported by the clerk, to the end that this court may order that a translation be supplied and printed with the record.

38.

MODELS, DIAGRAMS, AND EXHIBITS OF MATERIAL.

1. Models, diagrams, and exhibits of material forming part of the evidence taken in a case, and brought up to this court for its inspection, shall be placed in the custody of the marshal at least one week before the case is heard or submitted.

2. All such models, diagrams, and exhibits of material, placed in the custody of the marshal must be taken away by the parties within forty days after the case is decided. When this is not done, it shall be the duty of the marshal to notify counsel to remove the articles forthwith; and if they are not removed within a reasonable

time after such notice, the marshal shall destroy them, or make such other disposition of them as to him may seem best.

39.

FORM OF PRINTED RECORDS, PETITIONS, BRIEFS, ETC.

1. All records, petitions, motions and briefs, printed for the use of the court must be in such form and size that they can be conveniently bound together, so as to make an ordinary octavo volume, having pages 6⅛ by 9¼ inches and type matter 4⅛ by 7⅛ inches, except that records in patent cases may be printed in such size as is necessary to utilize copies of patent documents. They and all quotations contained therein, and the matter appearing on the covers, must be printed in clear type (never smaller than 11-point type) adequately leaded; and the paper must be opaque and unglazed. If footnotes are included, they may not be printed in type smaller than 9-point.

2. All printed documents presented to the court, other than records, must bear on the cover the name and post office address of the member of the bar of this court who is counsel of record for the party concerned, and upon whom service is to be made. The individual names of other counsel and, if desired, their post office addresses, may be added. The body of the document shall at its close bear the printed names of counsel of record and of such other individual counsel as may be desired. One copy of every printed motion filed with the clerk (other than a motion to dismiss or affirm under Rule 16) must in addition bear, at the appropriate place in the body thereof, the manuscript signature of counsel of record.

3. All printed documents presented to the court other than records, which in this respect are governed by Rule 36 (5), shall, unless they are less than ten pages in length, be preceded by a subject index of the matter contained

therein, with page references, and a table of the cases (alphabetically arranged), text books and statutes cited, with references to the pages where they are cited.

4. The clerk shall refuse to receive any printed document which has been printed otherwise than in substantial conformity to this rule.

40.

BRIEFS—IN GENERAL.

1. Briefs of an appellant or petitioner on the merits shall be printed as prescribed in Rule 39, and shall contain in the order here indicated—

(a) A reference to the official and unofficial reports of the opinions delivered in the courts below, if there were such and they have been reported.

(b) A concise statement of the grounds on which the jurisdiction of this court is invoked, with citation to the statutory provision and to the time factors upon which such jurisdiction rests.

(c) The constitutional provisions, treaties, statutes, ordinances and regulations which the case involves, setting them out verbatim, and citing the volume and page where they may be found in the official edition. If the provisions involved are lengthy, their citation alone will suffice at this point, and their pertinent text shall be set forth in an appendix.

(d)(1) The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein.

(2) The phrasing of the questions presented need not be identical with that set forth in the jurisdictional statement or the petition for certiorari, but the brief may not raise additional questions or change the substance of the questions already presented in those documents. Ques-

tions not presented according to this paragraph will be disregarded, save as the court, at its option, may notice a plain error not presented.

(e) A concise statement of the case containing all that is material to the consideration of the questions presented, with appropriate references to the printed record, e. g., (R. 12).

(f) In briefs on the merits, or in any briefs wherein the argument portion extends beyond twenty printed pages, a summary of argument, suitably paragraphed, which should be a succinct, but accurate and clear, condensation of the argument actually made in the body of the brief. It should not be a mere repetition of the headings under which the argument is arranged.

(g) The argument, exhibiting clearly the points of fact and of law being presented, citing the authorities and statutes relied upon.

(h) A conclusion, specifying with particularity the relief to which the party believes itself entitled.

2. Whenever, in the brief of any party, a reference is made to the record, it must be accompanied by the record page number. When the reference is to a part of the evidence, the page citation must be specific. If the reference is to an exhibit, both the page number at which the exhibit appears and at which it was offered in evidence must be indicated, e. g., (Pl. Ex. 14; R. 199, 2134).

3. The brief filed by an appellee or respondent shall conform to the foregoing requirements, except that no statement of the case need be made beyond what may be deemed necessary in correcting any inaccuracy or omission in the statement of the other side, and except that items (a), (b), (c) and (d) need not be included unless the appellee or respondent is dissatisfied with their presentation by the other side.

4. Reply briefs shall conform to such portions of this rule as are applicable to the briefs of an appellee or respondent, but need not contain a summary of argument,

regardless of their length, if appropriately divided by topical headings.

5. Briefs must be compact, logically arranged with proper headings, concise, and free from burdensome, irrelevant, immaterial, and scandalous matter. Briefs not complying with this paragraph may be disregarded and stricken by the court.

41.

BRIEFS ON THE MERITS—TIME FOR FILING.

1. Counsel for the appellant or petitioner shall file with the clerk forty copies of his printed brief on the merits, within thirty days after receipt by him of the printed record transmitted by the clerk pursuant to Rule 36 (5), or within forty-five days of the order noting or postponing probable jurisdiction or of the order granting the writ of certiorari, whichever is later. Where, however, a case is placed on the calendar too late in the term to be reached for argument before the commencement of the next term, the clerk will so notify the parties. In that event, counsel for the appellant or petitioner need not file the required number of copies of his brief prior to August 25, if that date would be later than thirty days after receipt of the printed record.

2. Forty printed copies of the brief of the appellee or respondent shall be filed with the clerk within thirty days after the receipt by him of the brief filed by the appellant or petitioner.

3. Reply briefs will be received up to the time the case is called for hearing; but, since later filing may delay consideration of the case, only by leave of court thereafter.

4. The periods of time stated in paragraphs 1 and 2 of this rule may be enlarged, as provided in Rule 34, upon motion duly made; or, if a case is advanced for hearing, the time for filing briefs may be abridged as circumstances shall require, pursuant to order of the court on its own or a party's motion.

5. Whenever a party desires to present late authorities, newly enacted legislation, or other intervening matters that were not available in time to have been included in his brief in chief, he may file forty printed copies of a supplemental brief, restricted to such new matter and otherwise in conformity with these rules, up to the time the case is called for hearing, or, by leave of court, thereafter.

6. No brief will be received through the clerk or otherwise after a case has been argued or submitted, except upon special leave.

7. No brief will be received by the clerk unless the same shall be accompanied by proof of service as required by Rule 33.

42.

BRIEFS OF AN AMICUS CURIAE.

1. A brief of an *amicus curiae* prior to consideration of the jurisdictional statement or of the petition for writ of certiorari, filed with the consent of the parties, or a motion for leave to file when consent is refused, may be filed only if submitted a reasonable time prior to the consideration of the jurisdictional statement or of the petition for writ of certiorari. Such motions are not favored. Distribution to the court under the applicable rules of the jurisdictional statement or of the petition for writ of certiorari, and its consideration thereof, will not be delayed pending the receipt of such brief or the filing of such motion.

2. A brief of an *amicus curiae* in cases before the court on the merits may be filed only after order of the court or when accompanied by written consent of all parties to the case and presented within the time allowed for the filing of the brief of the party supported.

3. When consent to the filing of a brief of an *amicus curiae* is refused by a party to the case, a motion for leave to file may timely be presented to the court. It shall

concisely state the nature of the applicant's interest, set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties, and their relevancy to the disposition of the case; and it shall in no event exceed five printed pages in length. A party served with such motion may seasonably file an objection concisely stating the reasons for withholding consent.

4. Consent to the filing of a brief of an *amicus curiae* need not be had when the brief is presented for the United States sponsored by the Solicitor General; for any agency of the United States authorized by law to appear in its own behalf, sponsored by its appropriate legal representative; for a State, Territory, or Commonwealth sponsored by its attorney general; or for a political subdivision of a State, Territory or Commonwealth sponsored by the authorized law officer thereof.

5. All briefs, motions, and responses filed under this rule shall be printed; shall comply with the applicable provisions of Rules 35, 39, and 40 (except that it shall be sufficient to set forth the interest of the *amicus curiae*, the argument, the summary of argument if required by Rule 40 (1)(f), and the conclusion); and shall be accompanied by proof of service as required by Rule 33.

43.

CALL AND ORDER OF THE CALENDAR.

1. The clerk shall, at the commencement of each term, prepare a calendar, consisting of the cases that have become or will be available for argument, which shall be arranged in the first instance in the order in which they are ordered set down for argument, and which shall indicate which of them have been ordered heard as summary calendar cases under Rule 44 (3). No separate summary calendar will be maintained. The arrangement of cases on the calendar shall be subject to modification in the

light of availability of printed records, extensions of time to file briefs, and of orders granting motions to advance or postpone or specially setting particular cases for argument. Cases will be calendared so that they will not normally be called for argument less than two weeks after the brief of the appellee or respondent has been filed. The clerk shall keep the calendar current throughout the term, adding cases as they are set down for argument, and making rearrangements as required. He shall periodically publish hearing lists in advance of each argument session, for the convenience of counsel and the information of the public.

2. Unless otherwise ordered, the court, on the second Monday of each term, will commence calling cases for argument in the order in which they stand on the calendar, and proceed from day to day during the term in the same order, except as hereinafter provided.

3. Cases will not be called until they are actually reached for argument. The clerk will seasonably advise counsel when they are required to be present in court.

4. Cases may be advanced or postponed by order of the court, upon motion duly made showing good cause therefor.

5. Two or more cases, involving the same question, may, on the court's own motion or by special permission on the motion or stipulation of the parties, be argued together as one case, or on such terms as may be prescribed.

44.

ORAL ARGUMENT.

1. Oral argument should undertake to emphasize and clarify the written argument appearing in the briefs theretofore filed. The court looks with disfavor on any oral argument that is read from a prepared text.

2. The appellant or petitioner shall be entitled to open and conclude the argument. But when there are cross-

appeals or cross-writs of certiorari they shall be argued together as one case and in the time of one case, and the court will, by order seasonably made, advise the parties which one is to open and close.

3. In cases on the summary calendar, half an hour, and no more, will be allowed for the argument, and only one counsel will be heard on the same side, except by special permission, which will be granted only upon a showing that parties with differing interests are on the same side. A case will be placed on the summary calendar whenever the court concludes that it is of such a character as not to justify extended argument.

4. In all other cases, one hour on each side, and no more, will be allowed for the argument, unless more time be granted before the argument begins. Any request for additional time shall be presented by letter addressed to the clerk (copy to be sent opposing counsel), and shall set forth with specificity and conciseness why the case cannot be presented within the one hour limitation. Two counsel, and no more, will be heard for each side, except by special permission when there are several parties on the same side. Divided arguments are not favored by the court. When no oral argument is made for one of the parties, only one counsel will be heard for the adverse party.

5. In any case, and regardless of the number of counsel participating, a fair opening of the case shall be made by the party having the opening and closing.

6. Oral argument will not be heard on behalf of any party for whom no brief has been filed.

7. Counsel for an *amicus curiae* whose brief has been duly filed pursuant to Rule 42 may, with the consent of a party, argue orally on the side of such party, provided that neither the time nor the number of counsel permitted for oral argument on behalf of that party under the preceding paragraphs of this rule will thereby be exceeded. In the absence of such consent, argument by

counsel for an *amicus curiae* may be made only by special leave of court, on motion particularly setting forth why such argument is thought to provide assistance to the court not otherwise available. Such motions, unless made on behalf of the United States or of a State, Territory, Commonwealth, or Possession, are not favored.

45.

SUBMISSION ON BRIEFS BY ONE OR BOTH PARTIES WITHOUT ORAL ARGUMENT.

1. The court looks with disfavor on the submission of cases on briefs, without oral argument, and therefore may, notwithstanding such submission, require oral argument by the parties.

2. When a case is called and no counsel appear to present argument, but briefs have been filed, the case will be treated as having been submitted.

3. When a case is called, if a brief has been filed for only one of the parties and no counsel appears to present oral argument for either party, the case will be regarded as submitted on that brief.

46.

JOINT OR SEVERAL APPEALS OR PETITIONS FOR WRITS OF CERTIORARI; SUMMONS AND SEVERANCE ABOLISHED.

Parties interested jointly, severally, or otherwise in a judgment may join in an appeal or a petition for writ of certiorari therefrom; or, without summons and severance, any one or more of them may appeal or petition separately or any two or more of them may join in an appeal or petition.

47.

FORM OF TYPEWRITTEN PAPERS.

1. All papers specifically permitted by these rules to be presented to the court without being printed shall, subject to Rule 53 (1), be typewritten or otherwise dupli-

cated upon opaque, unglazed paper, 8½ by 13 inches in size (legal cap), and shall be stapled or bound at the upper left-hand corner. The typed matter, except quotations, must be double-spaced. When more than one original is required by any rule, the copies must be legible.

2. The original copy of all typewritten motions and applications must be signed in manuscript by the party or by counsel, but, in a cause not yet docketed, such counsel need not be a member of the bar of this court.

48.

DEATH, SUBSTITUTION, AND REVIVOR.

1. Whenever either party shall die after filing notice of appeal to this court or filing of petition for writ of certiorari in this court, the proper representative of the deceased may appear and, upon motion, be substituted as a party to the proceeding. If such representative shall not voluntarily become a party, the other party may suggest the death on the record, and on motion obtain an order that, unless such representative shall become a party within a designated time, the party moving for such an order, if appellee or respondent, shall be entitled to have the appeal or petition for or writ of certiorari dismissed or the judgment vacated for mootness, as may be appropriate; and, if the party so moving be appellant or petitioner, shall be entitled to proceed as in other cases of non-appearance by appellee or respondent. Such substitution, or, in default thereof, such suggestion, must be made within six months after the death of the party, else the case shall abate.

2. Whenever, in the case of a suggestion made as provided in paragraph 1 of this rule, the case cannot be revived in the court whose judgment is sought to be reviewed because the deceased party has no proper representative within the jurisdiction of that court, but does have a proper representative elsewhere, proceedings shall then be had as this court may direct.

3. When an officer of the United States, or of the District of Columbia, a Territory, Commonwealth, Possession, State, county, city or other governmental agency, is a party to a proceeding here, and it is shown that he has died, resigned, or otherwise ceased to hold office, the action may be continued and maintained by or against his successor, if within six months after the successor takes office it is satisfactorily shown to the court, on motion, that there is a substantial need for so continuing and maintaining it. Substitution pursuant to this paragraph may be made when it is shown in the motion that the successor of an officer adopts or continues or threatens to adopt or continue the action of his predecessor in enforcing a law averred to be in violation of the Constitution of the United States. Service of and response to a motion to substitute under this paragraph shall be made as provided by Rules 33 and 35, respectively. Unless otherwise provided by law, no notice of appeal and no petition for writ of certiorari may be filed on behalf of an officer who has ceased to hold office.

49.

CUSTODY OF PRISONERS.

1. Pending review of a decision refusing a writ of habeas corpus, or refusing a rule to show cause why the writ should not be granted, the custody of the prisoner shall not be disturbed, except by order of the court wherein the case is then pending, or of a judge or justice thereof, upon a showing that custodial considerations require his removal. In such cases, the order of the court or judge or justice will make appropriate provision for substitution so that the case will not become moot.

2. Pending review of a decision discharging a writ of habeas corpus after it has been issued, or discharging a rule to show cause why such a writ should not be granted, the prisoner may be remanded to the custody from which he was taken by the writ, or detained in other appropriate

custody, or enlarged upon recognizance with surety, as to the court in which the case is pending, or to a judge or justice thereof, may appear fitting in the circumstances of the particular case.

3. Pending review of a decision discharging a prisoner on habeas corpus, he shall be enlarged upon recognizance, with surety, for his appearance to answer and abide by the judgment in the appellate proceeding; and if in the opinion of the court in which the case is pending, or of a judge or justice thereof, surety ought not to be required the personal recognizance of the prisoner shall suffice.

4. Except as elsewhere provided in this rule, the initial order respecting the custody or enlargement of the prisoner pending review, as also any recognizance taken, shall be deemed to cover not only the review in the court of appeals but also the further possible review in this court; and only where special reasons therefor are shown to the court of appeals or to this court or to a judge or justice of either court will that order be disturbed, or any independent order made in that regard.

5. This rule applies only to cases arising or pending in courts of the United States. For the purpose of this rule, a case is pending in the court possessed of the record until a notice of appeal or a petition for writ of certiorari has been filed, or until the time for such filing has expired, whichever is earlier; and is pending on review in the appellate court after the notice of appeal or the petition for writ of certiorari has been filed.

50.

APPLICATIONS TO INDIVIDUAL JUSTICES; PRACTICE IN CHAMBERS.

1. All motions and applications addressed to individual justices shall normally be submitted to the clerk, who will promptly transmit them to the justice concerned. If oral argument on the application is desired, request therefor shall accompany the application.

2. Except for applications for extensions of time, which are *ex parte* subject to the provisions of Rule 34 (4), all motions and applications addressed to individual justices and all requests for oral argument thereon, shall be accompanied by proof of service on all adverse parties. In urgent cases, proof of telegraphic dispatch to such parties of notice that the motion, application, or request is being made will suffice.

3. The clerk will in due course advise all counsel concerned, by means as speedy as may be appropriate, of the time and place of the hearing, if any, or, if no hearing is requested or granted, of the disposition made of the motion or application.

4. During the term, applications will be addressed to the justice duly allotted to the circuit within which the case arises. The court or the chief justice will seasonably instruct the clerk as to the distribution of applications during vacation, and whenever a circuit justice is temporarily absent or disabled.

5. A justice denying an application made to him will note his denial thereon. Thereafter, unless action on such application is by law restricted to the circuit justice, or is out of time under Rule 34 (3), the party making the application may renew the same to any other justice, subject to the provisions of this rule. Except where the denial has been without prejudice, such renewed applications are not favored.

6. Any justice to whom an application for a stay or for bail is submitted may refer the same to the court for determination.

51.

STAYS.

1. Stays may be granted by a justice of this court as permitted by law; and writs of injunction may be granted by any justice in cases where they might be granted by

the court. For supersedeas on appeal, see Rule 18; for stay pending review on certiorari, see Rule 27.

2. All applications for stays or injunctions made pursuant to this or any other rule must show whether application for the relief sought has first been made to the appropriate court or courts below, or to a judge or judges thereof, and shall be submitted as provided in Rule 50. See Rules 18 (2) and 27.

3. If an application for a stay addressed to the court is received in vacation, the clerk will refer it pursuant to Rule 50 (4).

52.

FEES.

In pursuance of 28 U. S. C. § 1911, the fees to be charged by the clerk of this court are fixed as follows:

(a) For docketing a case on appeal (except a motion to docket and dismiss under Rule 14 (3), wherein the fee is $25.00) or on petition for writ of certiorari or docketing any other proceeding, $100.00, to be increased to $150.00 in a case on appeal or writ of certiorari when oral argument is permitted.

(b) For preparing the record for the printer, indexing the same, supervising the printing and distributing the printed copies to the justices, the reporter of decisions, the library, and the parties or their counsel, 20 cents per folio of each 100 words; but where the necessary printed copies of the record as printed for the use of the court below are furnished, charges under this item will be limited to any additions printed here under the clerk's supervision, plus a handling charge of $25.00 in cases in which oral argument is permitted.

(c) For preparing, on filing, for the printer, petitions for writs of certiorari, briefs, jurisdictional statements or motions at the request of counsel, when, in the opinion of the clerk, circumstances require, indexing the same, changing record references to conform to the pagination of the printed record, and supervising the printing, 20

cents per folio of each 100 words. Neither the expense of printing nor the clerk's supervising fee shall be allowed as costs in the case. See Rule 57 (3).

(d) For making a copy (except a photographic reproduction) of any record or paper, and comparison thereof, 40 cents per page of 250 words or fraction thereof; for comparing for certification a copy (except a photographic reproduction) of any record or paper when such copy is furnished by the person requesting its certification, 10 cents for each page of 250 words or fraction thereof.

For comparing with the original thereof any photographic reproduction of any record or paper, when furnished by the person requesting its certification, 5 cents for each page.

(e) For a certificate and seal, $3.00.

(f) For an admission to the Bar and certificate under seal, $25.00.

(g) For a duplicate certificate of an admission to the Bar under seal, $10.00.

PART IX. SPECIAL PROCEEDINGS.

53.

PROCEEDINGS IN FORMA PAUPERIS.

1. A party desiring to proceed in this court *in forma pauperis* shall file a motion for leave so to proceed, together with his affidavit setting forth facts showing that he comes within the statutory requirements. See 28 U. S. C. § 1915; *Adkins* v. *DuPont Co.*, 335 U. S. 331. One copy of each will suffice. Papers in cases presented under this rule should, whenever possible, comply with Rule 47.

2. With the motion and affidavit there shall be filed the appropriate substantive document—statement as to jurisdiction, petition for writ of certiorari, or motion for leave to file, as the case may be—which shall comply in

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all respects with the rules governing the same, except that it shall be sufficient to file a single copy thereof. Notwithstanding any other provision of these rules, a party moving for leave to proceed *in forma pauperis* who shows that he was unable to obtain a certified copy of the record in the court below without payment of fees and costs need not file such a record with his jurisdictional statement, petition for writ of certiorari, or motion for leave to file.

3. When the papers required by paragraphs 1 and 2 of this rule are presented to the clerk, accompanied by proof of service as prescribed by Rule 33, he will, without payment of any docket or other fees, file them, and place the case on the miscellaneous docket.

4. The appellee or respondent in a case *in forma pauperis* may respond in the same manner and within the same time as in any other case of the same nature, except that the filing of a single response, typewritten or otherwise duplicated, with proof of service as required by Rule 33, will suffice whenever petitioner or appellant has filed unprinted papers.

5. While making due allowance for cases presented under this rule by persons appearing *pro se*, the clerk will refuse to receive any motion for leave to proceed *in forma pauperis* when it and the papers submitted therewith do not comply with the substance of this court's rules, or when it appears that the accompanying papers are obviously out of time.

6. If, in a case presented under this rule, the court enters an order noting or postponing probable jurisdiction, or granting a writ of certiorari, and the case is set down for argument, it will be transferred to the appellate docket, and the court will make such order respecting the furnishing and printing of the record as may be appropriate. The court may, in any case presented under this rule, require the furnishing and printing of the record prior to its consideration of the motion papers.

7. Whenever the court appoints a member of the bar to serve as counsel for an indigent party, the briefs prepared by such counsel will, unless he requests otherwise, be printed under the supervision of the clerk; and the clerk will in any event reimburse such counsel to the extent of first-class transportation from his home to Washington and return in connection with the argument of the cause.

54.

VETERANS' AND SEAMEN'S CASES.

1. A veteran suing to establish reemployment rights under the provisions of Section 9 (d) of the Universal Military Training and Service Act, as amended (50 U. S. C. App. § 459 (d)), or under similar provisions of law exempting veterans from the payment of fees or court costs, may proceed upon typewritten papers as under Rule 53, except that the motion shall ask leave to proceed as a veteran, the affidavit shall set forth the moving party's status as a veteran, and the case will be placed on the docket that would have been appropriate for its disposition had it been presented on printed papers.

2. A seaman suing pursuant to 28 U. S. C. § 1916 may proceed without prepayment of fees or costs or furnishing security therefor, but he is not relieved of printing costs nor entitled to proceed on typewritten papers except by separate motion, or unless, by motion and affidavit, he brings himself within Rule 53.

PART X. DISPOSITION OF CAUSES.

55.

OPINIONS OF THE COURT.

1. All opinions of the court shall be handed to the clerk immediately upon the delivery thereof. He shall cause the same to be printed and shall deliver a copy to the reporter of decisions.

2. The original opinions shall be filed by the clerk for preservation.

3. Opinions printed under the supervision of the justices delivering the same need not be copied by the clerk into a book of records; but at the end of each term he shall cause them to be bound in a substantial manner, and when so bound they shall be deemed to have been recorded.

56.

INTEREST AND DAMAGES.

1. Where judgments for the payment of money are affirmed, and interest is properly allowable, it shall be calculated from the date of the entry of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the State where such judgment was rendered.

2. In all cases where an appeal delays proceedings on the judgment of the lower court, and appears to have been sued out merely for delay, damages at a rate not exceeding 10 per cent., in addition to interest, may be awarded upon the amount of the judgment.

3. In cases in admiralty, damages and interest may be allowed only if specially directed by the court.

4. Where a petition for writ of certiorari has been filed, and there appears to be no ground for granting such a writ, the court may, in appropriate cases, adjudge to the respondent reasonable damages for his delay.

57.

COSTS.

1. In all cases of affirmance of any judgment or decree by this court, costs shall be paid by appellant or petitioner unless otherwise ordered by the court.

2. In cases of reversal or vacating of any judgment or decree by this court, costs shall be allowed to the appellant or petitioner, unless otherwise ordered by the court. The cost of the transcript of record from the court below

shall be a part of such costs, and be taxable in that court as costs in the case.

3. The cost of printing the record in this court is a taxable item. The cost of printing briefs, motions, petitions, and jurisdictional statements is not a taxable item.

4. In cases where questions have been certified, including such cases where the certificate is dismissed, costs shall be equally divided unless otherwise ordered by the court; but where the entire record has been sent up (Rule 28, par. 2), and a decision is rendered on the whole matter in controversy, costs shall be allowed as provided in paragraphs 1 and 2 of this rule.

5. No costs shall be allowed in this court either for or against the United States or an officer or agency thereof, except where specially authorized by statute and directed by the court.

6. When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, and annex to the same the bill of items taxed in detail. The prevailing side in such a case is not to submit to the clerk any bill of costs.

7. In appropriate instances, the court may adjudge double costs.

58.

REHEARINGS.

1. A petition for rehearing of judgments or decisions other than those denying or granting certiorari, may be filed with the clerk in term time or in vacation, within twenty-five days after judgment or decision, unless the time is shortened or enlarged by the court or a justice thereof. Such petition must briefly and distinctly state its grounds; it must be supported by a certificate of counsel to the effect that it is presented in good faith and not for delay; it must be printed in conformity with Rule 39; and forty copies, one of which shall bear the manuscript signature of counsel to the certificate, must

be filed, accompanied by proof of service as prescribed by Rule 33. A petition for rehearing is not subject to oral argument, and will not be granted, except at the instance of a justice who concurred in the judgment or decision and with the concurrence of a majority of the court.

2. A petition for rehearing of orders on petitions for writs of certiorari may be filed with the clerk in term time or vacation, subject to the requirements respecting time, printing, number of copies furnished, manuscript signature to certificate, and service, as provided in paragraph 1 of this rule. Any petition filed under this paragraph must briefly and distinctly state grounds which are confined to intervening circumstances of substantial or controlling effect (e. g., *Sanitary Refrigerator Co.* v. *Winters*, 280 U. S. 30, 34, footnote 1; *Massey* v. *United States*, 291 U. S. 608), or to other substantial grounds available to petitioner although not previously presented (e. g., *Schriber-Schroth Co.* v. *Cleveland Trust Co.*, 305 U. S. 47, 50). Such petition is not subject to oral argument. A petition for rehearing filed under this paragraph must be supported by a certificate of counsel to the effect that it is presented in good faith and not for delay, and counsel must also certify that the petition is restricted to the grounds above specified.

3. No reply to a petition for rehearing will be received unless requested by the court. No petition for rehearing will be granted in the absence of such a request and an opportunity to submit a reply in response thereto.

4. Consecutive petitions for rehearings, and petitions for rehearing that are out of time under this rule, will not be received.

59.

PROCESS; MANDATES.

1. All process of this court shall be in the name of the President of the United States, and shall contain the given names, as well as the surnames, of the parties.

2. Subject to paragraph 3 of this rule, mandates shall issue as of course after the expiration of twenty-five days from the day the judgment is entered, unless the time is shortened or enlarged by an order of the court or of a justice thereof, or unless the parties stipulate that it be issued sooner. Except in cases where the twenty-five day period expires in vacation, the filing of a petition for rehearing will, unless otherwise ordered, stay the mandate until disposition of such petition, and if the petition is then denied, the mandate shall issue forthwith.

3. In cases coming from federal courts, a formal mandate shall not issue unless specially directed. In the absence of such direction, it shall suffice for the clerk to send to the proper court, within the time and under the conditions set out in paragraph 2 of this rule, a copy of the opinion or order of this court, and a certified copy of the judgment of this court, which in cases under this paragraph shall include provisions for the recovery of costs if any are awarded.

60.

DISMISSING CAUSES.

1. Whenever the parties thereto shall, by their attorneys of record, file with the clerk an agreement in writing that an appeal, petition for or writ of certiorari, or motion for leave to file or petition for or extraordinary writ be dismissed, specifying the terms as respects costs, and shall pay to the clerk any fees that may be due him, the clerk shall, without further reference to the court, enter an order of dismissal.

2. Whenever an appellant or petitioner in this court shall, by his attorney of record, file with the clerk a motion to dismiss a proceeding to which he is a party, with proof of service as prescribed by Rule 33, and shall tender to the clerk any fees and costs that may be due, the adverse party may within fifteen days after service thereof file an objection, limited to the quantum of damages and

costs in this court alleged to be payable, or, in a proper case, to a showing that the moving party does not represent all appellants or petitioners if there are more than one. The clerk will refuse to receive any objection not so limited.

3. Where the objection goes to the standing of the moving party to represent the entire side, the party moving for dismissal may within ten days thereafter file a reply, after which time the matter shall be laid before the court for its determination.

4. If no objection is filed, or if upon objection going only to the quantum of damages and costs in this court, the party moving for dismissal shall within ten days thereafter tender the whole of such additional damages and costs demanded, the clerk shall, without further reference to the court, enter an order of dismissal. If, after objection as to quantum of damages and costs in this court, the moving party does not respond with such a tender, then the clerk shall report the matter to the court for its determination.

5. No mandate or other process shall issue on a dismissal under this rule without an order of the court.

PART XI. ABROGATION OF PRIOR RULES.

61.

EFFECTIVE DATE.

These rules shall become effective July 1, 1954, and shall be printed as an appendix to the United States Reports. The rules promulgated February 13, 1939, appearing in 306 U. S., Appendix, and all amendments thereof are rescinded, but this shall not affect any proper action taken under them before these rules become effective.

APPENDIX TO RULES.

FORMS FOR NOTICES OF APPEAL.

1. The forms of notices of appeal contained herein are intended for illustration only, to show what is sufficient under Rule 10.

2. The caption in each instance should be that of the cause being appealed, as it stood in the court in which the notice of appeal is to be filed under Rule 10 (3). Details of form should comply with the rules and practice of that court.

3. The form and manner of signature of the notice of appeal should likewise comply with the rules of the court in which the notice is to be filed.

4. Any form of service authorized by Rule 33 (1) may be employed, and proof of service may be made by any of the means authorized by Rule 33 (3).

FORM 1. NOTICE OF APPEAL FROM FEDERAL COURT, CIVIL CASE.[1]

United States District Court for the ..... District of ....., ... Division.[2]

A. B. C. CORP., PLAINTIFF, *v.* UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, D. E. F. R. R. CO., ET AL., DEFENDANTS.	CIVIL ACTION NO. ....[4]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES.

I. Notice is hereby given that A. B. C. CORP., the plaintiff above named, hereby appeals to the Supreme Court of the United States from the[3] (final order dismissing the complaint),[3] entered in this action on ....., 19....

This appeal is taken pursuant to 28 U. S. C. § 1253.[4]

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

(Here list each of the items to be included in the transcript of record.)

III. The following questions are presented by this appeal:

(Here list the questions presented, formulated as prescribed by Rule 10 (2)).[5]

[Signed] .....
Attorney for A. B. C. Corp.

Address .....[6]

PROOF OF SERVICE.[7]

I, ..., one of the attorneys for A. B. C. CORP., appellant herein, and a member of the Bar of the Supreme Court of the United States,[8] hereby certify that, on the .... day of ....., 19.., I served copies of the foregoing Notice of Appeal to the Supreme Court of the United States on the several parties thereto, as follows:

1. On the United States, by leaving a copy thereof at the office of ....., Esq., United States Attorney for the ..... District of ....., at Room ....., Federal Building, ...,[9] and by mailing a copy in a duly addressed envelope, with air mail postage prepaid,[10] to The Solicitor General, Department of Justice, Washington 25, D. C.[10]

2. On the Interstate Commerce Commission, by mailing a copy, in a duly addressed envelope, with air mail postage prepaid,[11] to ....., Esq., its Chief Counsel, at the offices of the Commission, Washington 25, D. C.[12]

3. On D. E. F. R. R. Co., G. H. RY. Co., ..., ..., intervening defendants, by mailing copies in duly addressed envelopes, with first-class postage prepaid,[13] to their respective attorneys of record, as follows:

To ....., Esq., Attorney for D. E. F. R. R. Co., (address);

To ....., Esq., Attorney for G. H. RY. Co., (address); (list each party or attorney served).

[Signed] .....
Attorney for A. B. C. Corp.

Address .....[6]

NOTES TO FORM 1.

[1] This presupposes a civil action pursuant to 28 U. S. C. §§ 2321–2325 to set aside an order of the Interstate Commerce Commission.

[2] Since this is accordingly a civil action in a federal court, the form of the caption is governed by the Federal Rules of Civil Procedure, subject to such modification as may be required by local rules and practice.

[3] Describe order or judgment as indicated in Form 27, F. R. Civ. P.

[4] This is the statutory provision authorizing the appeal in the case supposed; for other classes of cases, appropriate change in statutory reference must be made.

[5] Note that the substance of the questions presented may not be altered afterwards. Rule 15 (1)(c)(2); Rule 40 (1)(d)(2).

[6] The form of signature on the facts supposed is governed by the Federal Rules of Civil Procedure, subject to such modification as may be required by local rules and practice.

[7] Proof of service may be made by indorsement on the document served, or by separate instrument, or by a combination of both; see Rule 33 (3).

[8] Only a member of the Bar of the Supreme Court may certify to service. Rule 33 (3)(b). Service effected by any person not a member of the Bar of the Supreme Court must be proved by affidavit. Rule 33 (3)(c).

[9] Service may be effected by leaving a copy at the office of counsel. Rule 33 (1). And, where the United States is a party, the notice of appeal must be served on an attorney of record who represented the United States in the court whose judgment is sought to be reviewed. Rule 33 (2).

[10] If the United States is a party, service must likewise be made on the Solicitor General. Rule 33 (2).

[11] This presupposes a U. S. District Court 500 miles or more from Washington, hence air mail postage is required. Rule 33 (1).

[12] Since the Interstate Commerce Commission is an agency authorized by law to appear in its own behalf, it must also be served. Rule 33 (2).

[13] This presupposes that counsel for the non-government defendants are less than 500 miles distant from the person effecting service, hence ordinary first class postage suffices. Rule 33 (1).

FORM 2. NOTICE OF APPEAL FROM STATE COURT, CIVIL CASE.

In the Supreme Court of the State of.....[1]

A. B. C., APPELLANT,
v.
D. E. F., APPELLEE.
} No. .....[2]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES.

I. Notice is hereby given that A. B. C., the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment[3] of .....[4] (affirming, dismissing, etc.)[5] entered in this action[6] on ....., 19...

This appeal is taken pursuant to 28 U. S. C. § .....[7]

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

(Here list the items to be included in the transcript of record.)

III. The following questions are presented by this appeal:

(Here list the questions presented, formulated as prescribed by Rule 10 (2)).[8]

[Signed] .....
Attorney for A. B. C., Appellant.

Address .....[9]

PROOF OF SERVICE.

I, ..., a (stenographer) (clerk) (attorney) in the office of Messrs....., attorneys of record for A. B. C., appellant herein, depose and say [10] that on the ..... day of ....., 19.., I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on D. E. F., appellee herein, by delivering the same to (the receptionist)[11] in the offices of ....., counsel of record for said D. E. F., located at .....

[Signed] .....

Subscribed and sworn to before me, at ..... this ..... day of ....., 19...

.....[12]

NOTES TO FORM 2.

[1] Rule 10 (3) provides that "If the appeal is taken from a state court, the notice of appeal shall be filed with the clerk of the court possessed of the record." This may or may not be the supreme court of the state.

The caption should be that of the court in which the notice of appeal is filed.

[2] The form and style of the case should conform to the rules of the court in which the notice of appeal is filed.

[3] Only final judgments or decrees of state courts are reviewable; see 28 U. S. C. § 1257.

[4] Here indicate the court in which the judgment or order sought to be reviewed was entered, which may or may not be the court in which the notice of appeal is filed.

[5] Here describe generally the nature of the judgment or order sought to be reviewed, giving its date. Cf. *Dept. of Banking* v. *Pink*, 317 U. S. 264.

[6] Use the proper descriptive term under state law—suit, proceeding, action, etc., as the case may be.

[7] Indicate whether the appeal is taken pursuant to § 1257 (1) or § 1257 (2) of 28 U. S. C., the only provisions currently authorizing appeals from state courts to the Supreme Court of the United States.

NOTES TO FORM 2—Continued.

[8] Note that the substance of the questions presented may not be altered afterwards. Rule 15 (1)(c)(2); Rule 40 (1)(d)(2).

[9] The form of signature should comply with the rules of the court in which the notice of appeal is filed.

[10] This presupposes service by one not a member of the Bar of the Supreme Court, hence service must be proved by affidavit. Rule 33 (3)(c).

[11] Service by delivery to a clerk in the office of counsel is sufficient under Rule 33 (1).

[12] Here insert official character of person before whom the affidavit is sworn.

FORM 3. NOTICE OF APPEAL FROM STATE COURT, CRIMINAL CASE.

In the Supreme Court of the State of .....[1]

M. N. O., APPELLANT,
v.
STATE OF .....
No. .....[2]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES.

I. Notice is hereby given that M. N. O., the appellant above named, hereby appeals to the Supreme Court of the United States from the final order[3] of .....[4] (affirming the judgment of conviction),[5] entered herein on ....., 19...

This appeal is taken pursuant to 28 U. S. C. § .....[6]

Appellant was convicted of the crime of .....,[7] in violation of .....;[7] was sentenced to ..... years confinement at hard labor (and to pay a fine of $.....);[8] (and is presently confined at .....) (and is presently enlarged on bail in the sum of $.....) (and is not now in custody or enlarged on bail).[9]

(Parts II and III and signature, same as in corresponding portions of Form 2.)

PROOF OF SERVICE.

I, ..., Assistant Attorney General of the State of .....,[10] hereby acknowledge receipt of a copy of the foregoing Notice of Appeal to the Supreme Court of the United States, this ..... day of ....., 19...

[Signature] [10] .....

NOTES TO FORM 3.

[1], [2], [3], [4], [5] Same as corresponding notes under Form 2.

[6] Indicate whether the appeal is taken pursuant to § 1257 (1) or § 1257 (2) of 28 U. S. C., the only provisions currently authorizing appeals from State courts to the Supreme Court of the United States.

[7] Describe the offense in general terms, and include a citation to the statute involved.

[8] Indicate the sentence imposed.

[9] Indicate the place of confinement if the defendant below is in custody, and the amount of bail or recognizance if not in custody.

[10] Acknowledgment of service, if relied on to prove service, must be signed by counsel of record for the party served. Rule 33 (3) (a).

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